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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM [REDACTED] 1925

No. [REDACTED] 124

MILLERS' INDEMNITY UNDERWRITERS, PLAINTIFF IN
ERROR,

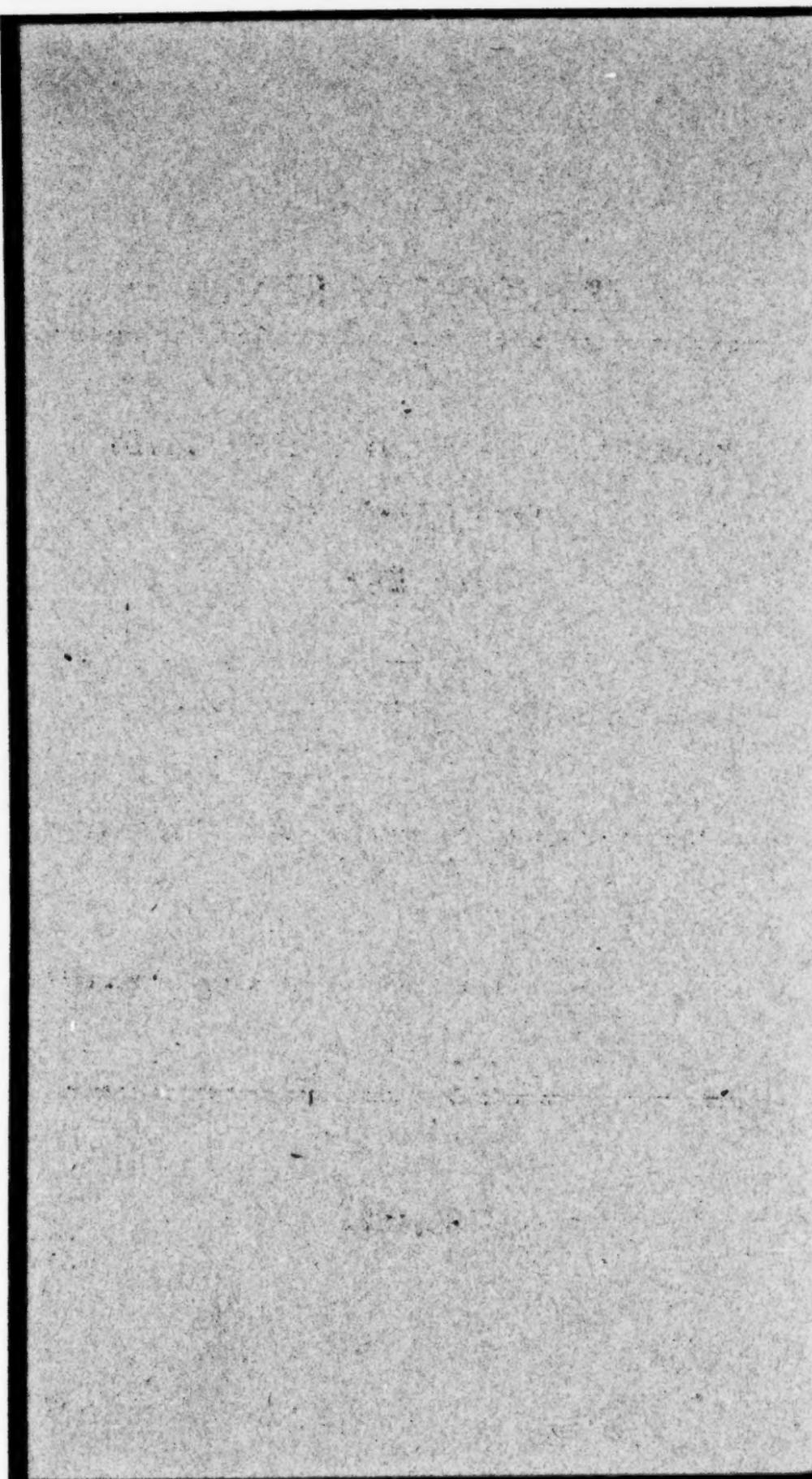
vrs.

MRS. NELLIE BOUDREAUX BRAUD (MRS. E. J. BRAUD)
AND ED. J. BRAUD

IN ERROR TO THE SUPREME COURT OF THE STATE OF TEXAS

Indicates that the above cause is filed in cause no.
FILMED JULY 2, 1934

Before [REDACTED]
(30,467)



(30,467)

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1924

No. 502

MILLERS' INDEMNITY UNDERWRITERS, PLAINTIFF IN
ERROR,

vs.

MRS. NELLIE BOUDREAUX BRAUD (MRS. E. J. BRAUD)
AND ED. J. BRAUD

IN ERROR TO THE SUPREME COURT OF THE STATE OF TEXAS

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[fol. 1]

CAPTION— OMITTED

IN THE

DISTRICT COURT OF ORANGE COUNTY, TEXAS

[fol. 2]

E. J. BOUDREAUX ET AL.

vs.

MILLERS' INDEMNITY UNDERWRITERS

PETITION—Filed Jan. 30, 1922

To the honorable judge of said court:

Now comes E. J. Boudreaux, R. J. Boudreaux, Mary M. Boudreaux, and Mrs. E. J. Braud, joined pro forma by E. J. Braud, plaintiffs, complaining of the Millers' Indemnity Underwriters, a mutual reciprocal insurance association, domiciled at Dallas, Texas, hereinafter styled defendants, and leave of the Court first had filed this, their First Amended Original Petition, and with respect presents to the Court as follows, to-wit:

1

That said named plaintiffs and each and all of them are the surviving brothers and sisters of O. O. Boudreaux, now deceased, being a brother of full blood, and at the time of his death, said O. O. Boudreaux was under the age of 21 years and died some time on or about April 17, 1920, as a result of injuries sustained during the course of his employment and while on duty at his said employment, in the lawful hours of his employment, and at the regular place of his employment, while employed by the National Ship Building Company at Orange, Texas; that the said O. O. Boudreaux was duly and regularly employed by the National Ship Building Company, and that on and prior to the date of his death and on the date of the injury sustained by him, the relation of employee and employer duly and regularly existed between the National Ship Building Company and the said O. O. Boudreaux.

2

That the said O. O. Boudreaux at and prior to the date of his said [fol. 3] decease was earning more than the sum of \$5.00 per day and that he was regularly in the employment of the said National Shipbuilding Company at Orange, Texas, and that the said O. O. Boudreaux had been so regularly and steadily employed in said plant at and prior to the 17th day of April, 1920, for a period of more than twelve months prior to said April 17, 1920, and that the average weekly wage of the said O. O. Boudreaux at and prior to the date of

his said decease and while so employed by the said National Shipbuilding Company was more than \$30.00 per week, and that 60% of said sum amounts to more than the sum of \$15.00 per week, and that these claimants in the proportion, to which they shall show themselves entitled to, were entitled to compensation at the rate of \$15.00 per week for a period of 360 weeks.

These plaintiffs present that in the event they are mistaken as to the facts hereinabove alleged concerning the length of time in which their said deceased brother, O. O. Boudreux, was employed by the said National Shipbuilding Company, then these plaintiffs say that an employee of the same class working substantially the whole of such immediately preceding year in the same or in a similar employment in the same or a neighboring place, would and could have earned an average weekly wage of \$30.00 per week and that 60% of said average weekly wage would have amounted to more than \$15.00 per week. That in the event neither of the above are true, then plaintiffs claim the right to show the average wage by any other method just and fair to both parties.

These plaintiffs and each of them present to the court that at and prior to the date of his said decease, that the said O. O. Boudreux contributed regularly and substantially of his wages and earnings to the support and maintenance of these plaintiffs and especially to the said Mrs. E. J. Braud, and that these plaintiffs were dependent at least in part upon the wages and earnings and the amounts contributed to their support and maintenance by their said brother and upon their said brother, that the said Mrs. E. J. Braud has a large family with a sick husband, and who was unable, who is and was unable wholly to support his said family and at and prior to his said decease, said O. O. Boudreux helped support and maintain the family of said Mrs. E. J. Braud.

That these plaintiffs presented their said claim to the Industrial Accident Board of the State of Texas, who made a final award and decree therein, and that in due course of time and within the time provided by law, these plaintiffs and each of them gave notice that they refused to abide by the final ruling and judgment of the Industrial Accident Board made in said cause on the 7th day of December, 1920 and gave notice that they would within the time required by law file suit to set the same aside, and did so file said suit, and that a copy of said final award, ruling and judgment of said Industrial Accident Board so made in said cause is hereto attached, marked as Exhibit "A" and prayed to be made a part hereof.

That these plaintiffs being dependents and surviving brothers and sisters of the said O. O. Boudreux are entitled to compensation at the rate of \$15.00 per week for a period of 360 weeks dating from the 14th of April, 1920 and until the full period of 360 weeks shall have elapsed, and that no part of the same has been paid, although demand has been made therefor.

[fol. 5]

These plaintiffs present that within the period of 30 days after the death of the said O. O. Boudreux while in the employment of the National Shipbuilding Company, as aforesaid, that notice of his said death while so employed was given to and had by his said employer and to the Industrial Accident Board and to the Millers' Indemnity Underwriters, the insurer in this cause, and that within six months after the death of the said O. O. Boudreux these plaintiffs and each of them made claim for Compensation to the said Industrial Accident Board and to the said Millers' Indemnity Underwriters, insurers and defendants herein, as provided by law and are now bringing this suit to set the award and ruling of the Industrial Accident Board made in this cause aside and recover the compensation to which they shall show themselves entitled herein. Plaintiffs gave notice of the death of O. O. Boudreux within 30 days after his death to defendant and the Industrial Accident Board; That they presented their claim on account of his death within six months after his death to the defendant and the Industrial Accident Board; That the Industrial Accident Board made its award, and that within 20 days thereafter plaintiffs gave notice of their intention not to be bound by the same to the defendant and the Industrial Accident Board and that within 20 days thereafter plaintiff filed this suit to recover against the defendant.

These plaintiffs further present that the said O. O. Boudreux was employed by the said National Shipbuilding Company, as a diver at Orange, Texas, and that on the date of his decease, that he was sent below by his said employers to perform his task as a diver, and these plaintiffs believe and have good reason to believe that while under the water that the supply of air furnished the said O. O. Boudreux became fouled, or that he was furnished an insufficient supply of air, or that in some manner the supply of air was cut off for the time being, so that the said O. O. Boudreux died [fol. 6] from suffocation.

Wherefore, the premises considered, plaintiffs and each of them pray the court that the Millers' Indemnity Underwriters, insurers, and that citation issue to them as required by law, and that on trial hereof, that these plaintiffs recover the amount of compensation to

which they shall be entitled as against said Millers Indemnity Underwriters; for the costs of suit, and that the said decree and judgment of the Industrial Accident Board made in this cause on the 7th day of December, 1920, be set aside, and in the alternate they recover the cost of burial, \$500.00, for such other and further relief, of a nature either legal or equitable, special or general in law or in equity, as to which they and each of them shall show themselves entitled and of this, the plaintiffs will in duty bound respectfully ever pray.

(Signed) Howth & O'Fiel, Attys. for Plaintiffs.

EXHIBIT A TO PETITION

F-3777

O. O. BOUDREAUx (Dec'd), Employee,

vs.

NATIONAL SHIP BUILDING Co., Employer; MILLERS INDEMNITY
UNDERWRITERS, Insurer

On this 7th day of December, A. D. 1920, after due notice to all parties at interest, came on to be considered by the Industrial Accident Board the claim for compensation made herein by E. J. Boudreaux, R. J. Boudreaux, Miss Mary M. Boudreaux and Mrs. E. J. Braud, surviving brothers and sisters of O. O. Boudreaux deceased, against the Millers Indemnity Underwriters; and the Board finds [fol. 7] as follows:

That the claims of the said E. J. Boudreaux, R. J. Boudreaux, Miss Mary M. Boudreaux and Mrs. E. J. Braud are founded upon the fatal injury suffered by O. O. Boudreaux, deceased, while engaged in the course of his employment in the capacity of employee for the National Shipbuilding Company on or about the 17th day of April 1920, and that the said National Shipbuilding Company was at the time of the said fatal injury a subscriber to the Employers' Liability Act through and by virtue of a policy of compensation carried by it with the Millers Indemnity Underwriters; and the board further finds that it has been established to its satisfaction that none of the surviving brothers and sisters were dependent upon the deceased at the time of his fatal injury, and therefore their claim for compensation must be denied and refused.

It is therefore ordered, adjudged and decreed by the Industrial Accident Board that the claims for compensation made herein by E. J. Boudreaux, R. J. Boudreaux, Miss Mary M. Boudreaux, and Mrs. E. J. Braud, be and the same are hereby in all things denied and refused, and the Millers Indemnity Underwriters is fully acquitted and discharged from all liability on account of this claim for compensation.

IN DISTRICT COURT OF ORANGE COUNTY

[Title omitted]

ANSWER—Filed Jan. 30, 1922

I

Now come the defendant and in answer to the plaintiffs' First Amended Original Petition say that this court is without jurisdiction to hear and determine the issues in this cause, in that the [fol. 8] employment in which the said O. O. Boudreaux was engaged at the time of his decease was of an admiralty nature, being work upon and from a barge situated upon and riding the public navigable waters of the Sabine River, clearing said public navigable waters of an obstruction, to-wit, a ways about nine feet under said water, in order to facilitate navigation on said public stream, and on the waters of a navigable stream, to-wit: the Sabine River at Orange, Texas, said barge at said time floating upon and wholly surrounded by said public navigable waters, and that any and all judicial issues arising out of his decease are exclusively cognizable in a court of admiralty jurisdiction and that the Workmen's Compensation Law of Texas has no application to the facts of this case.

Wherefore, the defendants pray judgment of this court whether it can or will take further cognizance of this cause and that this cause be dismissed for want of jurisdiction, and for their costs, etc.

II

For further answer, if required, defendants demur generally to said petition, and say the same is insufficient in law to state a cause of action against them, or either of them, and of this, defendants pray judgment of the court.

III

Further pleading in due order and without prejudice to their above please, the defendants, Carr P. Collins and B. P. Bailey, specially except to said petition, because the same states no cause of action against them, but shows upon its face that they are improperly joined as defendants therein, and of this they pray that they and each of them be dismissed from this cause and go hence without day and recover their costs.

IV

Further pleading in due order, and without prejudice to their above pleas, the defendants specially except to said petition, because [fol. 9] the same does not allege, (a) that the plaintiffs gave notice of the death of O. O. Boudreaux within thirty days after said death, (b) that they presented their claim on account of his death, within six months after said death, (c) that within twenty days after the Industrial Accident Board of Texas, made its award, the plaintiffs

gave notice to the adverse parties and to the Industrial Accident Board that they would not abide by said award, evidencing their intention to file suit to set the same aside, (d) and that they filed a suit to set the same aside within twenty days in compliance with the provisions of the Workmen's Compensation Law of Texas.

V

Further pleading in due order and without prejudice to their above pleas, the defendants except to said petition, because it does not allege how or in what manner the plaintiffs, or any one of them, were dependent upon O. O. Boudreux, deceased, the simple allegation that plaintiffs were dependent upon the said O. O. Boudreux, is a conclusion of the pleader, and the defendants are entitled to be put on notice as to the way and manner in which the said plaintiffs and each of them, were dependent upon said O. O. Boudreux.

VI

Further pleading in due order and without prejudice to their above pleas, the defendants except to a said petition and especially the ninth paragraph thereof, wherein plaintiffs allege and expenditure by them of \$500.00 for funeral expenses, and seek a recovery therefor against these defendants, because they say they are not liable for this expense, and that in any event the maximum amount recoverable under the Compensation Law under any circumstances on account of funeral expenses is \$100.00.

[fol. 10]

VII

For further answer, if required, and without prejudice to their above pleas, the defendants deny all and singular the allegation in said petition contained, and demand strict proof of same, and of this they put themselves upon the Country.

VIII

For further answer if required, and pleading in due order and without prejudice to their above pleas, the defendants specially deny that the plaintiffs or either of them, were dependent upon the deceased, O. O. Boudreux, at the time of his death, and of this they demand strict proof.

IX

For further answer, if required, and without prejudice to their above pleas, the defendants say in the alternative that if any of the plaintiffs were ever dependent upon the deceased, O. O. Boudreux, that such dependency if any, had ceased at and prior to the time of the O. O. Boudreux's death, and that said Dependency, if any, there ever was, had then ceased and did not exist.

X

For further answer, if required, but without prejudice to their above pleas, the defendants specially deny that the deceased O. O. Boudreux, came to his death as the result of a personal injury as the same is defined in the Workmen's Compensation Law, and of this they demand strict proof.

XI

For further answer if required, but without prejudice to their above pleas, the defendants specially deny that the deceased, O. O. Boudreux, came to his death as the result of any injury of a kind and character having to do with and originating in the work he was doing, and of this they demand strict proof.

[fol. 11]

XII

For further answer, if required, the defendants say that O. O. Boudreux, deceased, was afflicted with a disease of the heart and that said disease was the sole and proximate cause of his death and that his death did not occur under circumstances causing any liability on these defendants.

Wherefore, defendants pray that this cause be dismissed for want of jurisdiction, and that their special and general exceptions be sustained, and in the alternative, that plaintiffs take nothing by their suit, and that defendants go hence without day and recover their costs, and for such further relief, either general or special, at law or in equity, to which the defendants may show themselves, entitled, and as in duty bound, will defendants ever pray, etc.

(Signed) Morris & Barnes, Ed. S. McCarver, Atty's. for Defendants.

IN DISTRICT COURT OF ORANGE COUNTY, TEXAS

[Title omitted]

MOTION TO DISMISS—Filed Jan. 31, 1922

Now comes the defendant in the above entitled and numbered cause after the conclusion of the evidence and before the giving of any charge to the jury and moves the court to dismiss this cause for want of jurisdiction, it appearing from the pleadings and evidence that this cause is exclusively cognizable in a court of admiralty and [fol. 12] that this court has no jurisdiction to hear and determine any issues in this cause.

(Signed) Morris & Barnes, Ed. S. McCarver, Atty's. for Defendant.

Presented to me at the conclusion of the evidence, and before the giving of any charge to the jury, and presented to opposing counsel, in due time and after due consideration the same is —.

— — —, Judge Presiding.

Refused. J. B. Forse, Judge Presiding.

IN DISTRICT COURT OF ORANGE COUNTY, TEXAS

[Title omitted]

DEFENDANT'S REQUESTED INSTRUCTIONS TO JURY—Filed Feb. 1, 1922

GENTLEMEN OF THE JURY: At the request of the defendant you are instructed that your verdict should be that the plaintiffs take nothing by their suit and that you find for the defendant, and that you will so find.

— — —, Judge Presiding.

Present- to the court and opposing counsel in due time, and before the giving of any charge to the jury and —.

Refused. J. B. Forse, Judge Presiding.

[fol. 13] **IN DISTRICT COURT OF ORANGE COUNTY**

[Title omitted]

DEFENDANT'S OBJECTIONS TO COURT'S CHARGE TO JURY—Filed Feb. 1, 1922

Now comes the defendant and makes the following objections and exceptions to the court's charge to the Jury herein:

I

The defendant objects and excepts to the action of the court in giving any charge, except *an* peremptory instructions in its favor, for the following reasons:

(A) It appears from the uncontroverted evidence herein that this cause is exclusively cognizable in a court of admiralty, and that this court has no jurisdiction.

(b) There is no evidence that the defendant is responsible to the plaintiff for compensation herein.

(c) There is no evidence that the plaintiff or any one for her made a claim for compensation to defendant on account of the death

of O. O. Boudreux, or gave the defendant notice of his death, as required by the Compensation Law, nor that any cause existed why same should not have been done, nor that a strict compliance with the law in this respect was waived by the Industrial Accident Board.

(d) There is no evidence that the deceased, O. O. Boudreux, suffered an injury or personal injury as those terms are defined by law, causing his death.

(e) There is no evidence that the plaintiff was dependent upon the earnings of O. O. Boudreux, deceased, either in whole or in part, for a liv-lihood, or for the necessities of life.

(f) There is no evidence as to what was the average weekly wage of the deceased, O. O. Boudreux, nor as to the average weekly wage earned by an employee of the same class as to the deceased, working substantially the whole of the immediately preceding year [fol. 14] in the same or neighboring place.

Respectfully submitted, (Signed) Morris & Barnes, Ed. S. McCarver, Attys. for Defendant.

Submitted to the Court and opposing counsel in due time and before the giving of any charge to the jury, and after due consideration the same is by the court in all things overruled.

(Signed) J. B. Forse, Judge Presiding.

[fol. 15] IN THE DISTRICT COURT OF ORANGE COUNTY

[Title omitted]

CHARGE OF THE COURT TO JURY—Filed Feb. 1, 1922

GENTLEMEN OF THE JURY: This case will be submitted to you on special issues, in the form of questions propounded to you by the Court, the answers to which questions, when made by you, will constitute the verdict in this case.

You are the sole and exclusive judges of the facts proved, the credibility of the witnesses, and the weight and value to be given to their testimony, but the law you will receive from the Court in this written charge and such special charges as may be submitted to you by the Court, and you are bound to be governed thereby.

The burden of proof rests upon the plaintiff to establish by a preponderance of the evidence the material allegations contained in their petition.

Question Number 1. Was the death of O. O. Boudreux from natural causes, or was it caused from suffocation. Answer as you find the facts to be.

Ans. From suffocation.

Question Number 2. Did the deceased, O. O. Boudreux, contribute to the support of Mrs. E. J. Braud? Answer this question "yes" or "no". Yes.

Question Number 3. Was Mrs. E. J. Braud dependent upon the deceased, O. O. Boudreux, for support in whole or in part? In part.

Answer this question "yes" or "no", as you find the facts to be.

Question Number 4. What amount of money would sixty per cent of O. O. Boudreux weekly wages be for 360 weeks. \$16,200.00. [fol. 16] Answer this question as you find the facts to be.

J. B. Forse, Judge Presiding.

IN THE DISTRICT COURT OF ORANGE COUNTY

[Title omitted]

JUDGMENT—Filed Feb. 1, 1922

To Question No. 1 we answer "From suffocation."

To Question No. 2 we answer "Yes."

To Question No. 3 we answer "In part."

To Question No. 4 we answer "\$16,200.00."

To Special Issue submitted in Special Instruction No. 3, we answer "Yes."

To Special Issue submitted in Special Instruction No. 4, we answer "Yes."

To Special Issue submitted in Special Instruction No. 5, we answer "No."

(Signed) W. L. Sims, Foreman.

[fol. 17] **IN DISTRICT COURT OF ORANGE COUNTY**

[Title omitted]

JUDGMENT—Filed Feb. 3, 1922

On this, the 30th day of January, 1922, came on to be heard the above styled and numbered cause, and the plaintiffs appearing in person by its attorneys, both parties announced ready, and thereupon a Jury being demanded, selected, sworn and impaneled, who after having heard the evidence, the argument of counsel and the charge of the court, which said charge was in form of special issues to be answered by them, and the said jury having retired to consider their verdict and having brought into open court and announced that they had agreed upon a verdict, and the Jury's answers to said special issues being such as to constitute a verdict for the plaintiffs, and the Jury having found in reply to said special issues that the

deceased O. O. Boudreux, received an accidental injury in the course of his employment as an employe of the National Ship Building Company on April 17, 1920, in Orange County, Texas, which resulted in the Death of the said O. O. Boudreux, and that the said injury arose out of the employment of the said O. O. Boudreux as an employee of the said National Ship Building Company, and that the deceased's sister, Mrs. E. J. Braud, was dependent upon him in part for support, and that he contributed to her support, and that 60% of the average weekly wages of the said O. O. Boudreux amounted to more than \$15.00 per week, which said special issues and the answers of the jury thereto being attached hereto as a part hereof, and all other facts necessary to plaintiff's recovery being admitted and undisputed, and each and all of the other plaintiffs having dismissed and disclaimed except the plaintiff, Mrs. E. J. Braud, and the plaintiffs having dismissed their suit as to the defendants Baily & Collin and it appearing to the court that the plaintiff, Mrs. E. J. Braud joined herein proforma by her husband, E. J. Braud, are entitled to have and recover of and from [fol. 18] the defendant, Millers Indemnity Underwriters, a mutual reciprocal insurance association, domiciled at Dallas, Texas, the sum of \$15.00 per week for a period of 360 weeks, beginning April 22, 1920; of said weekly payments 92 weeks have accrued and become due and payable amounting in all to the sum of \$1,382.00, which said sum is now due and payable and that there remains unpaid, in addition thereto, 268 weeks at \$15.00.

It is therefore the order, judgment and decree of the Court that the plaintiff, Mrs. E. J. Braud, joined herein proforma by her husband, E. J. Braud, do have and recover of and from the Millers' Indemnity Underwriters the sum of \$1,382.00, together with 6% per annum interest from date hereof until paid, and that she do further have and recover of and from the Millers' Indemnity Underwriters the sum of \$15.00 per week for a period of 268 weeks, payable weekly and all costs in this behalf incurred, and for all of which execution may issue.

(Signed) J. B. Forse, Judge Presiding.

IN DISTRICT COURT OF ORANGE COUNTY

[Title omitted]

**DEFENDANT'S BILL OF EXCEPTION No. 1 AND ORDER SETTLING
SAME—Filed Feb. 14, 1922**

No. 1

Be it remembered: That upon the trial of the above entitled and numbered cause at a special term of said court, to-wit: On the 3rd day of February, 1922, the defendant then and there in open Court [fol. 19] excepted and objected to the action of the Court in render-

ing a judgment herein against this defendant for the following reasons:

(a) Because it was established by the undisputed evidence that this cause is of an admiralty and maritime nature and by Article 3, section 2, of the Constitution of the United States, and causes of an admiralty and maritime nature are placed exclusively within the jurisdiction of the Courts of the United States, and this court is without jurisdiction.

(b) Because it appeared from the undisputed evidence that this is a cause of an admiralty and maritime nature, and this court's entering said judgment is in effect a holding that the workmen's compensation law of Texas applies to admiralty and Maritime jurisdiction and therefore was an exercise of an authority under a statute of the State of Texas in violation of Article 3, Section 2, of the Constitution of the United States, which article and section placed in the jurisdiction of admiralty and maritime causes exclusively in the courts of the United States.

(c) Because it appeared from the undisputed evidence that this is a cause of admiralty and maritime nature and this court's entering said judgment was in substance and effect a holding that the plaintiff had a right of action under the Workmen's Compensation Law of Texas, against the insurer of his employer under said law, in addition to the remedies given plaintiff by admiralty jurisdiction and therefore was an exercise of an authority under the said Workmen's Compensation Law of Texas, in violation of the 14th Amendment to the Constitution of the United States, in that it denies to this defendant the equal protection of the law, because said Compensation Law does not afford an exclusive remedy, but leaves the employer and his property subject to a suit in admiralty.

(d) Because it appears from the undisputed evidence that this [fol. 20] cause is of an admiralty and maritime nature and the Workmen's Compensation Law of Texas is invalid under the Constitution of the United States and so far as it applies to admiralty and *the* maritime cases, and this being a cause, arising under said Compensation Law, it was error for the Court to enter said Judgment against this Defendant.

(e) Because it appeared from the undisputed evidence that the deceased, O. O. Boudreux, at the time of his death was engaged in clearing a public navigable stream, to-wit: The Sabine River at Orange, Texas, of an obstruction to navigation and commerce, the court's entering said judgment against this defendant was in violation of Article 1, Section 8, of the Constitution of the United States in that it constitutes a regulation of and burden upon commerce among the several states.

(f) Because it appeared from the undisputed evidence that this is a cause of admiralty and maritime nature, and that at the time of his death the said O. O. Boudreux, was engaged in clearing a

navigable stream, of an obstruction to commerce and navigation, and the court's entering said judgment against this defendant was in violation of the 14th Amendment to the Constitution of the United States, in that it takes the property of the defendant without due process of law.

* * * * *

All of which objections and exceptions were then and there overruled by the court, and the court rendered and entered said judgment against this defendant and to the said ruling of the court, the defendant then and there in open court accepted and here now tenders this its bill of exceptions thereto, and prays that the same may be examined, approved and ordered filed as a part of the record in this cause, which is accordingly so done this the 10th day of Feb- [fol. 21] ruary, A. D. 1922.

(Signed) J. B. Forse, Special Judge Presiding.

IN DISTRICT COURT OF ORANGE COUNTY

[Title omitted]

DEFENDANT'S BILL OF EXCEPTION NO. 2 AND ORDER SETTLING
SAME—Filed Feb. 14, 1922

Be it remembered: That upon the trial of the above entitled and numbered cause, at a special term of said court, to-wit: On the 3rd day of February, 1922, upon the court's entering its judgment against this defendant herein, the defendant then and there excepted and objected to the following recitation in said judgment, to-wit:

"And all other facts necessary to plaintiff's recovery being admitted and undisputed."

For the following reasons:

(a) Before the trial of this cause, and in due time and proper form, the defendant filed its First Amended Original Answer to the Plaintiff's First Amended Original Petition, upon which the plaintiff went to trial, which answer of this defendant contained a plea to the jurisdiction of the court, a general denial and special denials, as well as general and special demurrs and exceptions, as more fully appear from the defendant's said answer, putting the plaintiff upon proof of every fact and issue necessary to constitute a recovery for the plaintiff in this cause, and upon the trial of said cause, only one admission and agreement was made by this defendant, and that was that the deceased O. O. Boudreaux was working in the course of his employment [fol. 22] for the National Shipbuilding Company at the time of his death.

(b) There is no evidence that this court has jurisdiction of this cause, it appearing from the undisputed evidence that this is a cause

of an admiralty and maritime nature, which causes are placed exclusively within the jurisdiction of the courts of the United States, and it was not admitted that this court had jurisdiction.

(c) Because it appeared from the undisputed evidence that the deceased, O. O. Boudreux, at the time of his death was engaged in clearing a public navigable stream, to-wit: The Sabine River at Orange, Texas, of an obstruction to commerce and navigation, and it was not admitted that this court had jurisdiction or authority to enter a judgment in violation of Article 1, Section 8, of the Constitution of the United States, said judgment being a regulation of and burden upon commerce among the several states.

* * * * *

(h) Because the burden was upon plaintiffs to prove each and every allegation in their petition necessary for a recovery against this defendant, and no other fact was admitted or agreed to upon the trial of this cause than that the deceased, O. O. Boudreux, was working in the course of his employment at the time of his death.

All of which objections and exceptions were then and there overruled by the court and the court over the objections and exceptions of the defendant rendered and entered said judgment containing said recitation against this defendant, and to said action of the court the defendant then and there in open court excepted and here now tenders this its bill of exception thereto, and prays that the same may be examined, approved and ordered filed as a part of the record [fol. 23] in this cause, which is accordingly so done, this 10th day of February, A. D. 1922.

(Signed) J. B. Forse, Special Judge Presiding.

IN DISTRICT COURT OF ORANGE COUNTY

[Title omitted]

**MOTION TO SET ASIDE VERDICT AND FOR A NEW TRIAL AND ORDER
OVERRULING SAME—Filed Feb. 2, 1922**

Nw comes Millers Indemnity Underwriters, defendant in the above entitled and numbered cause and moves the court to set aside the verdict of the jury and judgment herein rendered against it on the 3rd day of February, 1922, for the following good and sufficient reasons:

I

The court erred to the prejudice of the defendant in overruling and refusing to sustain the defendant's motion to dismiss this cause for want of jurisdiction on the ground that this cause is exclusively cognizable in a court of admiralty, because it appeared from the un-

disputed evidence that this cause is of an admiralty and maritime nature, in that at the time of his death the deceased, O. O. Boudreaux, was engaged in submarine diving in the waters of a public navigable stream, to-wit; the Sabine River at Orange, Texas, and in attempting to clear the waters of said stream of an obstruction to navigation beneath the waters of said stream, and working from and attached to a divers' barge floating upon the waters of said stream about thirty five feet from shore, and that the said Boudreaux was working from and attached to said barge by means of a life line and air hose, and by Article 3, Section 2 of the Constitution of the United States cases [fol. 24] of an admiralty and maritime nature are placed exclusively within the jurisdiction of the courts of the United States and this being a cause of an admiralty and maritime nature this court is without jurisdiction, and defendant's motion to dismiss this cause upon the ground should have been sustained.

II

The court erred to the prejudice of the defendant in overruling and refusing to sustain the defendant's motion to dismiss this cause for want of jurisdiction on the ground that this cause is exclusively cognizable in a court of admiralty, because it appeared from the undisputed evidence that this cause is of an admiralty and maritime nature, and this court's refusal to sustain said motion being in effect a holding that the Workmen's Compensation law of Texas applies to admiralty and maritime jurisdiction, and therefore being an exercise of an authority under a statute of the State of Texas in violation of Article 3, Section 2, of the Constitution of the United States, which article and section places the jurisdiction of admiralty and maritime cases exclusively in the courts of the United States.

III

The court erred to the prejudice of the defendant in overruling and refusing to sustain the defendant's motion to dismiss this cause for want of jurisdiction on the ground that this cause is exclusively cognizable in a court of Admiralty, because it appeared from the undisputed evidence that this cause is of an admiralty and maritime nature, and this court's failure to sustain said motion being in substance and effect a holding that the plaintiff had a right of action under the Workmen's Compensation Law of Texas against the insurer, of his employer under said law in addition to the remedies given plaintiff [fol. 25] by admiralty jurisdiction, and, therefore, was an exercise of an authority under the said Workmen's Compensation Law of Texas in violation of the Fourteenth Amendment to the Constitution of the United States, in that it denies to this defendant the equal protection of the law, because said Compensation Law does not afford an exclusive remedy but leaves the employer and his property subject to a suit in admiralty.

IV

The court erred to the prejudice of the defendant in overruling and refusing to sustain the defendant's motion to dismiss this cause for want of jurisdiction upon the ground that this cause is exclusively cognizable in a court of admiralty, because it appeared from the undisputed evidence that this cause is of an admiralty and maritime nature and the Workmen's Compensation Law of Texas is invalid under the Constitution of the United States in so far as it applies to admiralty and maritime cases, and this being a cause arising under said Compensation Law should have been dismissed.

V

The court erred to the prejudice of the defendant in overruling and refusing to sustain the defendant's plea to the jurisdiction of this court on the ground that this cause is exclusively cognizable in a court of admiralty, because it appeared from the undisputed evidence that this is a cause of an admiralty and maritime nature, and by Article 3, Section 2, of the Constitution of the United States causes of an admiralty and maritime nature are placed exclusively within the jurisdiction of the courts of the United States, and this being a cause of an admiralty and maritime nature this court is without jurisdiction, and the defendant's plea to the jurisdiction on that ground should have been sustained.

VI

[fol. 25] The court erred to the prejudice of the defendant in overruling and refusing to sustain the defendant's plea to the jurisdiction on the ground that this cause is exclusively cognizable in the court of admiralty, because it appeared from the undisputed evidence that this cause is of an admiralty and maritime nature and this court's refusal to sustain said plea being in effect a holding that the Workmen's Compensation Law of Texas applies to admiralty and maritime jurisdiction, and therefore being an exercise of an authority under a statute of the State of Texas in violation of Article 3, Section 2, of the Constitution of the United States, which article and section place the jurisdiction of admiralty and maritime causes exclusively in the courts of the United States.

VII

The court erred in the prejudice of the defendant in overruling and refusing to sustain the defendant's plea to the jurisdiction in this cause on the ground that it is exclusively cognizable in a court of admiralty, because it appeared from the undisputed evidence that this cause is of an admiralty and maritime nature, and this court's failure to sustain said plea being in substance and effect a holding that the plaintiff had a right of action under the Workmen's Compensation Law of Texas against the insurer of the de-

ceased's employer under said law in addition to the remedies given to plaintiff by admiralty jurisdiction, and therefore was an exercise of an authority under the said Workmen's Compensation Law of Texas in violation of the Fourteenth Amendment to the Constitution of the United States, in that it denies to this defendant equal protection of the law, because said Compensation Law does not afford an exclusive remedy but leaves the employer and his property subject to a suit in admiralty.

[fol. 27]

VIII

The court erred to the prejudice of the defendant in overruling and refusing to sustain the defendant's plea to the jurisdiction on the ground that this cause is exclusively cognizable in a court of admiralty, because it appeared from undisputed evidence that this cause is of an admiralty and maritime nature, and the Workmen's Compensation Law of Texas being invalid under the Constitution and Laws of the United States in so far as it applies to admiralty and maritime cases, and this being a cause arising under said Compensation Law, said plea to the jurisdiction should have been sustained.

IX

The court erred to the prejudice of the defendant in failing and refusing to give in charge to the jury said defendant's requested charge number 1, being a peremptory instruction in its favor, reading as follows:

"GENTLEMEN OF THE JURY: At the request of the defendant you are instructed that your verdict should be that plaintiffs take nothing by their suit and that you find cause of the defendant and that you will so find."

It was error for the court to refuse to give said charge to the jury for the following reasons:

(a) Because it was established by the undisputed evidence that this cause is of an admiralty and maritime nature, and by Article 3, Section 2, of the Constitution of the United States, cases of an admiralty and maritime nature are placed exclusively within the jurisdiction of the courts of the United States, and this court is without jurisdiction.

(b) Because it appeared by the undisputed evidence that this is the cause of an admiralty and maritime nature, and this court's [fol. 28] refusal to give said preemtory instructions to the jury was in effect a holding that the Workmen's Compensation Law of Texas applies to admiralty maritime jurisdiction, and therefore was an exercise of an authority under a statute of the State of Texas in violation of Article 3, Section 2, of the Constitution of the United States, which Article and Section place the jurisdiction

of admiralty and maritime causes exclusively in the courts of the United States.

(c) Because it appeared from the undisputed evidence that this is the cause of an admiralty and maritime nature, and this court's refusal to give said charge to the jury was in substance and effect a holding that the plaintiff had a right of action under the Workmen's Compensation Law of Texas against the insurer of his employer under said law in addition to the remedies given plaintiff by admiralty jurisdiction, and therefore was an exercise of an authority under the said Workmen's Compensation Law of Texas in violation of the Fourteenth Amendment to the Constitution of the United States, in that it denies to this defendant the equal protection of the law, because said compensation law does not afford an exclusive remedy but leaves the employer and his property subject to a suit in admiralty.

(d) Because it appeared from the undisputed evidence that this cause is of an admiralty and maritime nature and the Workmen's Compensation Law of Texas is invalid under the Constitution of the United States in so far as it applies to admiralty and maritime cases, and this being a cause arising under said Compensation Law the jury should have been instructed to find for the defendant.

(e) Because it appeared from the undisputed evidence that the deceased O. O. Boudreux at the time of his death was engaged in clearing a public navigable stream, to-wit: the Sabine River at Orange, Texas, of an obstruction to navigation and commerce, and the court's refusal to give said peremptory instructions to the jury [fol. 29] is in violation of Article 1, Section 8, of the Constitution of the United States, in that it constitutes a regulation of and burden upon commerce among the several states.

(f) Because it appeared from the undisputed evidence that this is a cause of admiralty and maritime nature and that at the time of his death the said O. O. Boudreux was engaged in clearing a navigable stream of an obstruction to commerce and navigation, such refusal of the court to give said peremptory instructions to the jury is in violation of the Fourteenth Amendment to the Constitution of the United States, in that it takes the property of the defendant without due process of law.

* * * * *

X

The court erred to the prejudice of the defendant in entering a judgment herein against this defendant upon the jury's verdict, and over the objection of the defendant for the following reasons:

(a) Because it was established by the undisputed evidence that this cause is of an admiralty and maritime nature, and by Article 3, Section 2, of the Constitution of the United States causes of

admiralty and maritime nature are placed exclusively within the jurisdiction of the courts of the United States, and this court is without jurisdiction.

(b) Because it appeared by the undisputed evidence that this is the cause of an admiralty and maritime nature, and this court's entering said judgment was in effect a holding that the Workmen's Compensation Law applies to admiralty and maritime jurisdiction, and therefore was an exercise of an authority under a statute of the State of Texas in violation of Section 2, of Article 3, of the Constitution of the United States, which Section and Article placed the jurisdiction of admiralty and maritime causes exclusively in the court of the United States.

[fol. 30] (c) Because it appeared from the undisputed evidence that this is the cause of an admiralty and maritime nature, and this court entering said judgment was in substance and effect a holding that the plaintiff had a right of action under the Workmen's Compensation Law of Texas against the insurer of his employer under said law in addition to the remedies given by admiralty jurisdiction, and therefore was an exercise of an authority under the said Workmen's Compensation Law of Texas in violation to the Fourteenth Amendment to the Constitution of the United States, in that it denies to this defendant the equal protection of the law, because said Compensation Law does not afford an exclusive remedy but leaves the employer and his property subject to a suit in admiralty.

(d) Because it appeared from the undisputed evidence that this cause is of an admiralty and maritime nature, and the Workmen's Compensation Law of Texas is invalid under the Constitution of the United States in so far as it applies to admiralty and maritime causes, and this being a cause arising under said Compensation Law it was error for the court to enter said judgment against this defendant.

(e) Because it appeared from the undisputed evidence that the deceased, O. O. Boudreux, at the time of his death was engaged in clearing a public navigable stream, to-wit: the Sabine River at Orange, Texas, of an obstruction of navigation and commerce, and said judgment is in violation of Article 1, Section 8, of the Constitution of the United States, in that it constitutes a regulation of and burden upon commerce among the several states.

(f) Because it appeared from the undisputed evidence that this is a cause of an admiralty and maritime nature, and that at the time of his death the said O. O. Boudreux was engaged in clearing a public navigable stream of an obstruction to commerce and navigation, and said judgment is in violation of the Fourteenth Amendment to the Constitution of the United States, in that it takes the property of the defendant without due process of law.

XXI

The court erred to the prejudice of the defendant in incorporating in its judgment the following finding:

"And all other facts necessary to plaintiff's recovery being admitted and undisputed."

Because there is no evidence to sustain such a finding by the court, in that only one agreement and admission was made upon the trial of said cause, and that was that the deceased O. O. Boudreux was working in the course of his employment for the National Shipbuilding Company at the time of his death.

XXII

The court erred in incorporating in its judgment the following finding:

"And all other facts necessary to plaintiff's recovery being admitted and undisputed."

This was error for the following reasons:

(a) Before the trial of the cause the defendant filed its first amended original answer in which was contained a general denial and special denial, as well as exceptions and demur-ers, as it appeared to defendant from said action, putting the plaintiff upon proof of every fact and issue necessary to constitute a recovery for her in this cause, and upon the trial of said cause only one admission and agreement was made, and that was that the deceased, O. O. Boudreux, was working in the course of employment for the National Shipbuilding Company at the time of his death.

(b) There is no evidence that this court has jurisdiction of this cause, it appearing from the undisputed evidence that this is a cause of an admiralty and maritime nature, and it was not admitted that this court has jurisdiction.

* * * * *

[fol. 32] (g) It appeared upon the undisputed evidence that the deceased, O. O. Boudreux, at the time of his death was engaged in clearing a public navigable stream, to-wit: the Sabine River at Orange, Texas, of an obstruction to commerce and navigation, and it was not admitted that this court had authority to enter a judgment in violation of Article 1, Section 8, of the Constitution of the United States, said judgment being a regulation of and burden upon commerce among the several states.

* * * * *

Wherefore, defendant prays that said judgment and the jury's verdict rendered herein be set aside and held for naught, and that defendant be granted a new trial, for its costs, and that this suit

be dismissed for want of jurisdiction, for general and special relief, etc.

(Signed) Ed. S. McCarver, Morris & Barnes, Attys. for Defendant.

[Title omitted]

On this 3rd day of February, A. D., 1822, came on to be heard the motion of the defendant, Millers Indemnity Underwriters, in the above entitled and numbered cause for a new trial, and such motion having been submitted to the court in open court in due time, manner, and form, and with due notice, and it appearing to the court that said motion has been properly filed within two days after the date of the entry of judgment in said cause, and it appearing to the court that said motion should be overruled;

[fol. 33-39] It is, therefore, ordered, adjudged, and decreed that same be, and it is hereby overruled, to which action and ruling of the court the defendant then and there in open court excepted and in open court gave notice of appeal to the court of civil appeals for the ninth supreme judicial district of Texas, sitting at Beaumont, and on motion of the defendant, it is hereby allowed sixty days in addition to the time allowed by law to have prepared and filed statement of facts herein, and transcript, and to have prepared and filed its bills of exceptions herein.

(Signed) J. B. Forse, Judge Presiding.

BOND ON APPEAL FOR \$5,402—Approved and filed Feb. 14, 1922
omitted in printing

IN DISTRICT COURT OF ORANGE COUNTY

[fol. 40]

[Title omitted]

STATEMENT OF FACTS

Be it remembered that on January 30, 1922, the above numbered and entitled cause came on to be heard in its regular order on the docket of said Court, before the Honorable J. B. Forse, Judge Presiding, whereupon came all parties by their respective attorneys and announced ready for trial, and, before the selection of a jury, the defendants presented to the Court their general demurrer and special exceptions to the plaintiffs' petition, which were in all things overruled, to which action of the Court, defendants then and there in open Court excepted. Thereupon, a jury having been demanded, came — Sims and eleven others who were duly empaneled and

sworn, and thereupon the following were the facts, and all the facts [fol. 41] introduced in evidence by the respective parties:

PLAINTIFFS' EVIDENCE

NICK KAHL, a witness called by the plaintiffs, being duly sworn, testified as follows:

Direct examination:

My name is Nick Kahl. I live in Beaumont, and have lived at Beaumont since 1913. My business is that of a submarine diver. Yes, sir, a diver. Yes, sir, by submarine diver I mean going down under water with a diving suit on and working under there. I have been following that business ever since 1881. As to whether I know what were the usual and customary wages for a diver in Orange and Beaumont, in this general vicinity in April, 1920, well, the Government paid me fifty dollars a day and all expenses. As to what were the general and customary wages for a diver where you employ a diver, they generally always got from ninety dollars a week and up. Yes, sir, and sometimes fifty dollars a day. Sometimes more. I knew O. O. Boudreaux. He worked for me. He was a diver, and a good one, too. Yes, sir, a good one. He was probably twenty five or six years old; might have been a little older; I am not sure. He was a strong, healthy young man. I don't know how long he had been a diver. As to how long he had been a diver within my knowledge, he built two ways right across here, I think it is called the International Shipbuilding Company, and he built two at Beaumont. I think he worked in Orange from start to finish. As to about how long he worked in Orange, will say, while the war was on, and I think the shipbuilding company started in before the war, if I ain't mistaken. I don't know exactly how long he worked over here as a diver in Orange; I think all that time, probably three years, maybe a little more or less. As to whether he ever did [fol. 42] any work in Beaumont, he built those two ways over in Beaumont, and he done fine work there. As to how long he was engaged in diving over there, well, it takes all the way from a month to two months to build those ways, and he built two. Yes, sir. He was from two to four months diving, diving every day. If the air is supplied to him properly, a man with a diving helmet and suit on can stay under water all day if he wants to. As to whether they work underneath water with saws, hammers, brace and bit, etc., yes, sir, saws, hammers, air-drills, everything. As to whether I can describe to the jury just how the diving suit is equipped, the helmet, well, I don't know that any of these gentlemen know anything about it. The suit is a helmet, breast plate, and weights and heavy shoes, and a good pump is the main part. As to how the air gets to the diver below, you have a pump and a couple of men pumping air. The pump is on top of the barge. No, sir the barge is not under water; it is above the water. They pump the air through a rubber hose to the helmet. As to what it is that prevents the water from coming up under the helmet and drowning the man, the air does. In other words, the air being forced down through the helmet

downward, displaces the water, but if the suit is in perfectly good condition, there is absolutely, you don't get wet a bit, not a particle. There are different kinds of diving outfits. A man can go down in the water just with a helmet alone and nothing else. You may illustrate the helmet by setting a tub over his head. The water would come up under there and drown the man if it wasn't for the air coming down and displacing it. A man can go down under the water with the helmet, and no suit, and work. And the constant pressure of the air displaces the water and prevents the water from coming under there. If the pressure were released, and just the helmet was on him, he would drown. If he had on the complete suit and the air pump stopped the water could not get *it* there. If it was properly equipped it couldn't. If water got in there, the suit was [fol. 43] leaking some place.

As to whether a diving suit and the helmet is all one piece, completely enclosing the man, where his hands and body couldn't get wet, will say his hands could. If he had a complete suit on and the pump stopped working, he would not drown; he would suffocate if they didn't pull him up, because he would have no air. In other words, he would breathe up all the oxygen in the helmet, and he would die from want of oxygen. Yes, sir, air is a composition of nitrogen and oxygen. Oxygen is the life-giving substance and when that is gone the man suffocates. And fresh supplies of oxygen are pumped by the pump. If one of the rubber hose becomes twisted while a man is down underneath, working, he would suffocate. The man above should attend to all that, and give a little signal every five or ten minutes. The pump might be working and not give sufficient air. All this work is done by feeling, and you can't see a thing under these waters, and if it gets jammed against something, or gets a kink in it, you wouldn't get air. A man, a diver, with a saw or air hammer, or air bit, or anything like that, working on piling or on the bottom of a ship, cannot see what he is doing, not in these waters. They are just as black as night. He does his work by feeling, by sense of touch. As to whether the man under water would know whether his rubber hose is twisted, he would find it out mighty quick, if he can't breathe. Yes, sir, if he can't breathe, he is dying then. The pump might be working but the hose twisted. A good tender is supposed to keep everything straight, and he can feel what the diver is doing all the time. You state I said -while ago the pump might be working, apparently supplying air, while as a matter of fact the diver would not be getting air; I have a case in mind; I don't know whether they did on this or not. As to whether I can tell the jury what defect there might be in the pump or its connections that it would be pumping all right, apparently supplying air, and yet not supplying it, and what [fol. 44] conditions of the pump that would be, well, I couldn't tell exactly; the pump don't give any air, the pump might be working enough, but the hose might be in such shape the air would not get to the diver. And sometimes the pump might not be packed right. Yes, there might be something wrong with the packing. All of my diving outfits have a gauge, so that they can tell; the gauge

might show on top, but the diver not be getting air, on account of the hose being squashed against something.

I have been a diver since 1881—a good long time. I have been engaged in the business constantly.

Q. Now, I will ask you the question, when a man dies underneath the water, in a diving suit, what is the general and common cause of his death.

Defendant: We object to that.

Mr. Howth: He is an expert.

Defendant: It doesn't make any difference; he can't prove the cause of the death in this particular case by showing what caused death in some other case.

Mr. Howth: I think the cause of that man's death is based more or less on expert testimony, to show generally what causes it; merely as a circumstance, that is all.

Defendant: The circumstances should be shown, and not presumed.

Mr. Howth: I will connect that up later; I can't put it all in at once.

The Court: I will overrule the objection, if you connect it up.

Defendant: Note our exception.

Q. When a man under water is pulled up dead, what is the general cause, the most common cause of the man's death.

A. Insufficient air.

[fol. 45] Defendant: We object further to that; the general or common cause; that would not be proof in this case.

Mr. Howth: This is a circumstance, tending to show—but the Court has already passed on it, I believe.

The Court: Yes, sir.

Defendant: Note our exception.

(Witness continues:) Yes, sir, the cause generally is insufficient air. When you get insufficient air, the result to the man down below is that he would suffocate, that is all.

Q. What is the fact that it doesn't get there caused by?

Defendant: Object to that, Your Honor.

Q. What are the causes.

A. Pump don't work right, or the air hose has got a kink in it or something, and the air don't get there.

Mr. Howth: This witness knows all the things, and every one of the things that can cause an insufficient amount of air being received by a diver, and he is competent to state it.

Mr. Morris: We object to it as a matter calling for a conclusion.

The Court: Objection overruled.

Mr. Morris: Note our exception.

(Witness continues:) Yes, sir, one of the causes is the pump not working right; that will produce an insufficient amount of air.

Another is that the rubber hose that conveys the air to him has got a kink in it or twist in it in some way. That is another cause.

Q. Can't the carelessness or negligence or inattention to business of the tender charged with the business of pumping air cause that?

A. No, they might be pumping all the time but couldn't get air to him. I don't know of any other cause right now.

Mr. Morris: Our objection goes to all of this.

[fol. 46] (Witness continues:) Yes, O. O. Boudreux was well known to me, and worked for me a long time. Yes, sir, he was an experienced, competent and skillful diver. He was a good man, a good diver. I paid him \$90 a week.

Q. Captain, I will ask you why a diver's wages are higher than the wages of a man working on shore?

Mr. Morris: We object to that as immaterial to any issue in the case. He might state what his wages were.

Mr. Howth: I think the jury will know. I withdraw that. I think it is a matter of common knowledge.

Mr. Morris: We object to those side-bar remarks of counsel as to what is a matter of common knowledge.

Mr. Howth: I don't know how that would hurt him; it is a matter of common knowledge to all men.

The Court: All right; it is in the record.

(Witness continues:) As to how long I had known Mr. Boudreux, will say while the war was on, and he got drafted in the service. Yes, sir, he was drafted in the service of the government, he was in the army. I don't remember whether he went abroad or not; I think likely he has.

Mr. Morris: We object to that as immaterial.

Q. Do you know whether or not he passed the examination and actually entered the service?

Mr. Morris: We object to that as immaterial in this case.

Mr. Howth: I think it is highly material in this case. They plead this man died of an organic heart trouble, and the fact that he was passed into the army, is certainly a fact that goes to show his physical condition.

Mr. Morris: Before they could prove that they would have to prove what the examination was, how they were examined, and all those things. We object to the testimony further as irrelevant and incompetent.

[fol. 47] Mr. Howth: We insist upon it, and think it is highly proper and very material.

The Court: What is the question?

Mr. Howth: I asked him whether or not he knows of his own knowledge that Mr. Boudreux, the deceased, actually entered the service of the government.

Witness: At the time he came out of the service, that is the time he came to work for me.

Mr. Morris: We object to the witness answering the question before it is ruled on.

The Court: Objection overruled.

Mr. Morris: Note our exception.

(Witness continues:) Yes, sir. I know he did enter the service; that is what he told me. I really don't know what department he was in.

Mr. Morris: We object to what he told witness.

Q. Did you see him while he was in a government uniform?

A. Yes, sir.

Mr. Morris: We object to that, too.

Mr. Howth: It would be a very strong circumstance; it would be a felony to wear it without right.

Mr. Morris: We object to the statement of counsel.

Mr. Howth: I have a right to do it; perfectly in my rights in answering your objection.

The Court: I will permit him to answer.

Mr. Morris: Note our exception.

(Witness continued:) Yes, sir, I saw him in the regular uniform of the United States Army. I really don't remember whether he was a private or a commissioned or non-commissioned officer.

Q. Will you describe him, as to whether he was a weak, sickly man, or robust stout, vigorous young man?

Mr. Morris: We object to that; it is a conclusion, and he is not [fol. 48] shown to be an expert.

The Court: Objection overruled.

(Witness continues:) He was a strong, healthy looking man. As to whether he did a man's work, will say yes, sir, you bet he did. The work of a diver, going underneath the water, handling tools, requires a good strong man, and somebody to help him. You bet it is a man's job. When I say he built the ways, I do not mean wharves; he built the ways for launching these ships.

Q. Tell how those ways were constructed?

Mr. Morris: We object to that.

Court: Overruled.

A. Pile driver comes and drives the piles, and they put caps on them. And the piling have to be sawed off by a diver, generally. As to why they don't saw them off above the water, you can't launch a boat above the water. Yes, sir, they are sawed off below the low tide water line, all the way from four to fourteen feet underneath the water; they have got to be inclined. Each one must be in uniformity with the others. That is done by sense of touch, but you need your engineering aid from above. Yes, sir, if a diver is supplied with air, he could stay down all day long, if he wants to. As to where Mr. Boudreux is now, will say he is dead.

Mr. Morris: We object to that; we admit he is dead.

Mr. Howth: If you admit it, I don't know why you object, unless you just want to object.

Cross-examination:

The helmet is fastened to the breast plate in such a way that there is absolutely no way for water to get in and air to get out. No, sir, I didn't state that there was nothing to keep the water from coming up there; if you got the whole armor on, you don't get wet at all. You can go down with your best suit of clothes and not get wet a bit. [fol. 49] As to whether I stated that with just a helmet there was nothing to keep the water from coming up, when you just wear a helmet, the water comes up to about the chin. The air pressure keeps it down. I have got some of my business cards with me. If you wish to see it, you can see exactly what it consists of.

Mr. Howth: Give the jury a few of those cards, Captain.

(Witness hands to the jury several of the cards referred to containing a picture of a diver in full armor.)

(Witness continues:) In answer to your question as to how long it would take a man to suffocate if he is under water and the pump should stop working and the air should stop coming for any cause, will say when a man is under water working hard, why, he needs every bit that the pump gives him. As to how long it would take the water to get under there, if he wears the helmet only, he gets it right now. As to how long it would take him to use up the supply of air in the suit, already, on hand, in case the air quits coming, will say, my pump broke not long ago; about five minutes. But wait a minute, he is a man working hard, doing hard work, then you need every bit of air; you have got to breathe pretty fast. Yes, it would last me about five minutes. When you have got the full armor on, first the helmet is screwed on to the breast plate; then you have got your diving dress; and you put your weights on, and your shoes, and you are ready to go down. It is the hose that comes up to the air pump that supplies the air. Some of them connect with a reservoir, and some don't. As to whether that is the usual way they work, and whether they have a reservoir and keep a certain pressure in that reservoir, will say, no, these pumps that they used they didn't have a reservoir; that is for very deep diving. Yes, sir, when they have a reservoir, they have got a gauge, to show how much air they have got; that is what the gauge is there for. That hose goes down, and [fol. 50] connects on the diving suit, and fills the suit with air. The connection a man under the water has with the outside world in addition to that hose is a life line. That goes around his waist and comes up by the helmet, and when he wants to give any signal, or they want to get any to him, it is done by the life line. Yes, sir, they signal by this line that goes around his waist and connects with the helmet also. That is an ordinary small line. Yes, sir, you call it a rope; it is a little bit thicker than the ordinary clothes line; it is a good strong rope; it is hemp, though small. Yes, sir, the diver can give signals

with that rope to people on top, with the exception he had a telephone. I don't know whether they had a telephone in this outfit or not. As to whether he could signal by pulling on that line, the tender is supposed to have hold of the air hose and the line all the time, and they signal by pulling the line. As to whether a diver could not signal to pull him up when the air became exhausted or quit coming into his suit, that is what he should do, right away. As to whether there is nothing to keep him from it, it all depends on what position he is in. Sometimes he is lying down, or sawing, or going over piling, and it is a tough proposition. Sometimes you are in a position where you can't get to it. As to whether I just stated that the supply of air will last about five minutes, that is if he is not working hard, it will. Yes, sir, he can pull the life line to let in more air, or if he wants to be pulled out. Yes, sir, in a suit of this kind, a full suit, if a man was *if a person was* drowned the suit would be full of water when you brought it up. As to whether it would be full of water, well, not altogether, if you got everything in good shape you wouldn't get a bit of water in it, no time. As to whether it would be full of water if a person was drowned, will say not if he got sufficient air; if the armor should begin to leak and he got plenty of air, it would keep the water down just the same. As to whether where a person is drowned under [fol. 51] water the suit gets full of water, no, they very seldom get drowned when they have the full suit on. You say where they have got the full suit on it must get full of water when they drown; but I say not where they got the full suit, if everything is complete. As to whether the suit must get full of water to drown a man, will say, if the air is sufficient you would never drown. Yes, sir, if water gets in the suit it would drown him, if you got enough water in it. Yes, sir, you would have to get it full of water to drown.

Redirect examination:

If he has got on a full suit or just a helmet, if the air was coming down, he would never drown. Yes, sir, it would suffocate him if you shut the air off. If a man is under water engaged in work, he is using the air just about as fast as it is supplied.

Q. If even a minute of time elapsed, he begins to strangle?

Mr. Morris: We object to that as leading.

A. Well, he don't feel comfortable a bit, I can tell you that. Yes, sir. I stated to Mr. Morris that he would use up the air supply in five minutes if it should be shut off. Oh, yes, I also stated that if he was working he would use it up in a less time. As to the circumstances under which he would use it up in five minutes and in less time, we all know when a man is working hard you need more air, breathe more, and need more oxygen. If you don't work hard, why you don't need so much. When I said he would use it up in five minutes, I referred to a state of facts where he was not working. You ask me if a man was working, engaged in actual work, sawing, and drilling, and things like that underneath the water, how long it would take to use up the supply of air; well, where he was sawing

piling off, he has got to go over some piling and getting over the caps and before he can ever get up; it takes a long time. If the [fol. 52] suits fails to renew the supply of air, where the man is working, he would use up the supply of air mighty quick. If I should find water in a diving suit after a man had come up from the bottom of the water, I would say there was a leak somewhere. As to whether it might be in the pipe, or in the helmet, or in the suit, it wouldn't be in the pipe, particularly; it would be in the helmet or suit. Even if the suit leaked a good deal and got plum full of water, if the air kept coming down he would never drown; it would keep the water forced below his chin.

Recross-examination:

As to how long a man can live without breathing, I never have tried it, but I don't think it is a very good while. As to whether I was ever under when my air was cut off, will say when my pump broke, I only had on the helmet at that time, and I didn't get time to give any signal; I came right up. I was in thirty feet of water, and I came up when my air pump quit working. I didn't have weights on; I just had the helmet on. Yes, I just swam on up myself. Yes, sir, I came up in thirty feet of water after the pump quit.

Re-direct examination:

When a man has got on one of these full suits, the helmet and outer garments complete, before you can sink him you put heavy weights on him, on his feet. These weights are iron and weigh about fifty pounds. When a man has on one of those full suits he cannot swim or raise himself. Of his own power, of his own volition he cannot come up if he is in one of those full suits. No sir, he can not. It is absolutely impossible. If he has got nothing but the helmet he can throw the helmet off and come up. But if he has on one of those full suits it is impossible for him to come up.

[fol. 53] Re-cross examination:

As to whether I said those weights are about fifty pounds; the weights are heavier than that; I think the shoes are 32 pounds, and the weights are about seventy-five or eighty pounds, depending on the depth of the water. Even if a man is in nine or ten feet of water, you would have to have weights to keep upright. You could cut those weights off with a knife, but you would generally come up feet first, and a man don't want to come up feet first. Yes, if a man is in ten feet of water, and a ladder is handy, he could come up the latter, if he has got enough air; if he hasn't, it would be pretty hard. As to whether if a man has these weights on, whether he can signal and be pulled up just as quick as he could swim up, he could get up, but sometimes you are not ready to be pulled up, because you have got to go around about way; if you get in this way, you have got to go out that way. In those ways you have got four rows of piling,

and a man might have to go up and down and climb over these, and if you walk around you are tangled up, and that is the reason a diver gets such good pay.

Re-re-direct examination:

As to what one of those full outfits weighs, well, if I got it all and put in a box, it takes two good men to lift it. The railroads generally charge me pretty close to five hundred pounds for one of the full outfits.

Re-re-recross-examination:

As to what is the weight of the suit and weights etc. that a man has on under water, the dress weighs about 35 or 40 pounds, and the weight weighs probably seventy-five or eighty pounds, and the shoes 32; it all depends on what kind you are wearing. And the helmet weighs probably 65 or 75 pounds. I never have weighed them separately that way.

[fol. 54] Mr. BENNIE WILLIAMS, a witness called by the plaintiffs, being duly sworn, testified as follows:

Direct examination:

My name is Bennie Williams. I live at 1403 John Street, Orange, Texas. I have lived here since March 4, 1895. My business is that of machinist. In April, 1920, I was following the carpenter trade, working on a barge for the National Shipbuilding Company. No, sir, I did not know Mr. Boudreaux. I couldn't say where I was when he died. I was working on the barge when this occurrence happened. I was working on a barge about as far as from here to the railroad track out there. Yes, sir, working on a barge. As to whether I saw anything unusual and whether I knew he was under water, I didn't know he was there; I knew the diver was there. Yes, sir, independent of who it was, it was this occasion. I knew there was a diver under water. He was right below where I was working, in the water, in the Sabine River. They were working on the ways. Yes, sir, that was opposite the city of Orange, in this County, in the Sabine River. The diver was repairing the ways. He did have to go underneath the water to do it. I don't know whether they had one or two divers, but I know there was one diver at work. As to whether I remember anything unusual occurring where the diver was at work, there was a crowd begin to gather there, around where those fellows were watching the man that was doing the diving, where the pump tenders were that were supplying air to him or supposed to be. Yes, sir, a crowd begun to gather there.

Q. Do you know whether they had got the man out of the water or not?

A. They told me they had not; I don't know.

Mr. Morris: We object to what they told him.

[fol. 55] (Witness continues:) I saw the excitement and know the crowd gathered. I did not go over there. I was on the barge, and it was about quitting time in the evening; we quit at 4 o'clock, and when the whistle blowed off for us to go home, the crowd began to congregate so down there so that I decided I wouldn't go. A good many of the boys come on away, and I met them and asked what was the matter and they said a man was drowned.

Mr. Morris: We object to that.

(Witness continues:) That was about 75 yards from where these men were working. These men were working for the National Shipbuilding Company. I do not know what kind of work they were doing; I suppose they were working on the barges. No, they were not all working at repairing these ways; most of them were working on the barges, doing carpenter work, and most of them had went down to see what the trouble was. Yes, sir, I know about where that pump was. It was situated in the Sabine River, just below the barge I was working on, just above the ways in the Sabine River. It must have been 50 yards from the barge. At the time this crowd gathered there and the excitement was on, I did not hear any of the by-standers make any statements, that is, employees of this company. I heard those that I talked to after I got off duty. I did hear those people make a statement.

Q. Just go ahead and tell the jury what it was.

Mr. Morris: We object to that.

The Court: When was it.

Mr. Howth: Right there, when the crowd was gathering, and when the excitement was on.

Mr. Morris: We understand him to say it was after he quit work.

Q. Was that at the time this man was drowned? **A.** Just after; before he was taken out of the water.

The Court: Objection overruled.

Mr. Morris: Defendants would not be bound by any employee [fol. 56] not shown to have any knowledge of what they are talking about, or any special knowledge, or any other fact that would show that their statement was true other than just surmise, and another thing, it doesn't show exactly when this happened, being 75 yards away he talked to these men after he quit work, and it would not be a part of the res gestae.

(Witness continues:) I was about 75 yards from where the diver was when the statements were made to me.

Q. When were these statements made with reference to the time it was discovered there was something wrong with the diver and before he was drawn up?

Mr. Morris: We object to his stating there was something wrong discovered with the diver, because he doesn't know; he wasn't there, and didn't see, and he hasn't stated so, and we object to the statement of counsel.

The Court: Objection overruled.

Mr. Morris: Note our exception.

(Witness continues:) It was after the crowds had gathered and during the time they were gathering. You see, some of them was leaving and some was going over, and as I was going out some of the hands that come on from work, from the place, come up there, and I asked them what was the trouble. Yes, sir, they had been there where the trouble was; they said they had.

Mr. Morris: We object to that, what they said.

The Court: I think the objection is good.

Mr. Howth: I want to show they are purporting to tell what they knew. They had been there. I understand these men had been to the scene where this diver was. Is that right?

The Witness: Yes, sir. I don't know that they had. They said [fol. 57] they had been down there and just come from there.

Mr. Morris: We object to what they said.

Q. Did you ask them what was the matter?

A. Yes, sir.

Q. Did they tell you?

A. Yes, sir.

Mr. Morris: We object to that, what they said.

Q. Did they tell you what was the matter, and how it all happened?

A. They told me what they thought was going on, and what was the trouble.

Mr. Morris: That certainly is objectionable as hearsay.

Mr. Howth: These men had been down there, your Honor; they said they had been down there and seen; that was before they had drawn this man up from the water.

Witness: They said they hadn't taken him out yet.

Mr. Morris: We object to that as hearsay.

Q. These men were employees of the National Shipbuilding Company?

A. Yes, sir.

Q. What kind of work were they engaged in?

A. Carpenter work.

Mr. Howth: Well, now, your Honor, I offer to prove what these men said was the cause of this man's death and how it happened.

Mr. Morris: We object to it as hearsay.

The Court: Objection sustained.

E. J. BOUDREAUX, a witness called by the plaintiffs, being duly sworn, testified as follows:

Direct examination:

My name is E. J. Boudreux. Yes, sir, I knew O. O. Boudreux. He was my brother, full-blooded brother. O. O. Boudreux is now dead. He was 28 years old when he died. Yes, sir, 28 years old. As to whether he was a puny man or a strong, able bodied man, he was a strong man; he looked just like my brother over there. Yes, [fol. 58] sir, that young man with the red tie on is my brother, too. My brother who is dead was not quite as tall as that one, but he was that stout. I am 36 years old. And this brother here is 24. There are no other brothers but us three; we had an older brother, but we don't know where he is. We have two sisters. We have one married sister. Her name is Mrs. Eddie Braud. She lives in Lafouche Parish, about two miles from Thibodeaux. Yes, sir, she is married. Her husband is a carpenter, when he can work. He is a sickly man; he is suffering from gall stones. He follows the business of a carpenter. He does not work very regular. In fact, he hasn't worked now for about two months. The reason he doesn't work, he is suffering from pain in the side.

Q. Is he a sick man?

Mr. Morris: Now, your Honor, we object to what his condition is now. The inquiry should be as to what his condition was when this accident occurred.

(Witness continues:) In 1920 my brother-in-law was a sick man. He had been sick about four years. Yes, sir, he works at the carpenter's trade when he is able to work. They have six children, from thirteen years old to about three. I think there are two girls. The thirteen year old child is a girl. My sister is not very well, but she is better than my brother. They do not own their home in Louisiana. As to whether or not they rent it, we own a little farm there, and they had a share, but they really owe us for their share. They do not own a home of their own. No, they do not. My sister and her husband are poor people.

Q. I will ask you whether or not your brother who is dead, O. O. Boudreux, whether he supported them, or contributed to the support of your sister's family in his life time and up to his death?

Mr. Morris: We object to that as calling for a conclusion.

Mr. Howth: I am asking what he knows.

Witness: Yes, sir.

[foy. 59] (Witness continues:) Yes, sir, I know; I saw the cheeks. Yes, sir, my brother who is dead, O. O. Boudreux, supported and contributed to the support of my sister and her family. He had been doing that about three years up to the time of his death. As to whether that was regular or irregular, will say not every month;

you see some time he would send them fifty dollars, sometimes sixty, sometimes forty; he gave them as high as a hundred and fifty dollars that I know in one month. No, sir, he did not send them anything else, clothing, or anything like that, in addition to sending money. He just sent them money. My brother O. O. Boudreux was single. Yes, sir, he went to the war, joined the army during the war between Germany and the United States.

Mr. Morris: We object to that, Your Honor.

The Court: Overruled.

He went as a private.

Mr. Morris: We object to all this, Your Honor, as immaterial.

The Court: Same ruling.

Mr. Morris: Note our exception.

As to whether he actually went into service, or went to the training camp, he went to the training camp at Camp Pike, Arkansas. He was in training about three months. He did not get a chance to go abroad. As to whether the war stopped before he got over there, I think he was exempted to come here and work in the shipyards. Yes, sir, after he had been in the training camp three months they exempted him to come and work in the shipyards as diver.

Mr. Morris: Your Honor, our objection goes to all this testimony.

The Court: Overruled.

Mr. Morris: Note our exception.

As to whether O. O. Boudreux ever helped me and my other brother, he helped us about four years ago; not lately. But he did help my sister right up to the time of his death.

[fol. 60] Q. I ask you whether or not your sister was dependent on his help, whether she looked forward to it and depended on it?

A. Yes.

Mr. Morris: We object to that, Your Honor, as calling for a conclusion of the witness.

Q. You know your sister's condition?

—. Yes, sir.

The Court: Objection overruled.

Mr. Morris: Note our exception.

I have another sister, who is in the convent, a nun. The three boys, one of whom is dead and the married sister, and the one in the convent comprise the whole family. Yes, sir, I know when and where my brother died. It was on the 17th day of April in Orange, April 17, 1920. I saw him two weeks previous to his death, and after his death I saw him the next day. As to what hour it was, will say the train came in about three o'clock, and we live five miles from the station; it was about four o'clock. You state that you understand his death occurred about five o'clock on Saturday, on the 17th day of April, 1920 and ask me when I saw him on

Sunday. That was about four o'clock Sunday afternoon; maybe a little after four, but about four.

Q. Now, I will ask you to tell the jury his appearance, how he looked, what his face looked like.

Mr. Morris: Your Honor, we object to that as immaterial, at the time he saw him.

The Court: Objection overruled.

Mr. Morris: Note our exception. We object as immaterial, and further as a conclusion of the witness and prejudicial to the rights of the defendants.

The Court: Overruled.

Mr. Morris: Note our exception.

His eyes were bulged out, popped out, and his lips about three times their natural size. His tongue was dark. As to whether it was thick and swollen or normal, I couldn't see it very much. [fol. 61] His face was very swollen, dark blue; his forehead was swollen, his eyes, and his ears. As to whether his features were distorted or normal features, will say all swollen. You couldn't keep his collar buttoned on; couldn't find no collar to fit him.

Mr. Morris: It is understood our exception goes to all of this.

The Court: Yes, sir.

Cross-examination:

Q. Mr. Boudreaux, your depositions were taken about the 29th of September, 1920, and in answer to the tenth interrogatory, subdivision A, as follows, "If anyone in any way had to contribute to their support (referring to Mrs. Braud, your sister, and family) during the year 1920, please state who helped support them giving the amount and date of each contribution," your answer to that question was "Mrs. Braud has received as much as \$60.00 per month from her brother O. O. Boudreaux." In your answers just now you said she received as high as \$150.

A. I said in one month.

(Witness continued:) My occupation is that of an engineer. I am employed by the E. Z. Opener Bag Company, Braithwaite, La. I have been employed there four years, I think. During the month of April, 1920, as to the amount of my salary at that time, will say, when I started I got \$50 a month, but I worked up to \$150, but I don't remember if I got \$150, but I think I was getting \$150 then. Yes, sir, in the first part of 1920, I was getting as much as \$150 a month. No sir, I was not receiving any assistance from my brother, O. O. Boudreaux during the last four years. As to whether I am in good physical condition, generally speaking, I don't know if I am; I have been operated on for rupture. I can work all right, but I can't lift any heavy articles. I don't need any help. I don't need any help now, and have not for the last four years.

[fol. 62] Redirect examination:

I am not a married man.

Recross-examination:

No, sir, I am not a married man. I am making \$150 a month.

Re-redirect examination:

(All matters attempted to be testified to in this re-redirect examination excluded on objection of defendants.)

The plaintiff's next introduced in evidence the Direct Interrogatories propounded to MAMIE EDMONDSON, of Austin, Travis County, Texas, together with her answers thereto, which are as follows:

My name is Mamie Edmonson. I am over 21 years of age. My present occupation is that of Secretary of the Industrial Accident Board of the State of Texas, which position I have held since March 1st, 1920 and in which capacity I was employed on and prior to April 17th. I am Secretary of the Industrial Accident Board at present. As Secretary of the Industrial Accident Board I am and was custodian of the records, papers, and documents of said Board on and prior to April 17th, 1920. Our record does not contain an official notice of injury in the case styled: O. O. Boudreux vs. Nat'l Shipbuilding Company and being No. F-1777. It does, however, contain a Report of An Accident to Employee received and filed on the 26th day of April, 1920.

Mr. Morris: We object to that part of the answer that says "It does contain a Report of an Accident to Employee, because it is inadmissible for the purposes of this case."

The Court: Objection overruled.

Mr. Morris: Note our exception.

[fol. 63] This Board has not received an official Notice of Injury, but have received from the National Shipbuilding Company a Report of an Accident to O. O. Boudreux.

Mr. Morris: We object to the latter part of that, having received a report from the National Shipbuilding Company.

The Court: Objection overruled.

Mr. Morris: Note our exception.

Hereto attached is certified copy of Report of Accident to O. O. Boudreux made by the National Shipbuilding Company and filed in this office on April 26, 1920, and marked Exhibit "A."

Mr. Morris: We object to that for the same reason, and to the question.

The Court: Objection overruled.

Mr. Morris: Note our exception.

No official claims for compensation for death have been filed with this Board. Informal Claims were filed with this Board by

E. J. Boudreaux, R. J. Boudreaux, Mrs. E. J. Boudreaux Braud and Mary M. Boudreaux through their attorney David E. O'Fiel on September 8th, 1920, which claims for compensation are supported by the affidavits of E. J. Boudreaux, R. J. Boudreaux, Mrs. E. J. Boudreaux Braud and Mary Boudreaux filed by attorney David E. O'Fiel on November 23rd, 1920.

Mr. Morris: We object to that.

The Court: Same ruling.

Mr. Morris: Note our exception.

Hereto attached is certified copy of letter from attorney David E. O'Fiel giving notice that E. J. Boudreaux, R. J. Boudreaux, Mrs. E. J. Boudreaux Braud and Mary M. Boudreaux claim compensation for the death of O. O. Boudreaux and also copies of affidavits of E. J. Boudreaux, R. J. Boudreaux, Mrs. E. J. Boudreaux Braud and Mary M. Boudreaux in support of said claims for compensation, [fol. 64] which are marked Exhibit "B."

Mr. Morris: We object to that for the same reasons.

The Court: Overruled.

Mr. Morris: Note our exception.

Original letter from attorney David E. O'Fiel giving notice that E. J. Boudreaux, R. J. Boudreaux, Mrs. E. J. Boudreaux Braud and Mary M. Boudreaux claimed compensation was filed in this office on September 8th, 1920 and affidavits in support of said claims were filed on November 23rd, 1920.

Mr. Morris: We object to that for the same reasons.

The Court: Overruled.

Mr. Morris: Note our exception.

After receipt of Report of Accident to an Employee on April 26th 1920 and on April 30th, 1920 this Board through me as its Secretary gave notice to Millers Indemnity Underwriters of the fatal injury and death of O. O. Boudreaux. This letter was written Millers Indemnity Underwriters on April 30th, 1920.

Hereto attached is certified copy of letter written by me as Secretary of the Industrial Accident Board to Millers Indemnity Underwriters notifying said insurance company of the death of O. O. Boudreaux, marked Exhibit "C."

Mr. Morris: Same objection.

The Court: Same ruling.

Mr. Morris: Note our exception.

Letter to Millers Indemnity Underwriters was signed, sealed up in envelope, addressed to Millers Indemnity Underwriters which bore a return card, was stamped and placed in the United States Post Office and same has not been returned undelivered.

Mr. Morris: We object to that for the same reasons, for *for the* further reason that they were not shown to be acting as agent for the plaintiffs in this case.

The Court: Overruled.

[fol. 65] Mr. Morris: Note our exception.

The Board has received two letters from Millers Indemnity Underwriters relative to the receipt of Report of an Accident to an Employee and Claims for Compensation filed by the surviving beneficiaries through attorney David E. O'Fiel. Hereto attached are certified copies of these letters marked Exhibit "D".

Mr. Morris: We object to that for the same reason.

The Court: Overruled.

Mr. Morris: Note our exception.

Defendants here introduced the second cross interrogatory to this witness and her answer thereto, as follows:

No, this Board does not act as agent either for an insurance company or a claimant under the compensation law. In rare cases insurance companies have sent checks in payment of compensation to this Board for delivery to injured workmen.

Plaintiffs next introduced in evidence the following Exhibits attached to the depositions of the witness Mamie Edmonson.

Mr. Morris: Your Honor, we object to the following exhibits, for the reason that the matters stated therein are not competent, being ex parte statements, and all of it is immaterial, irrelevant, and incompetent as evidence for any purpose in this case.

The Court: Objection overruled.

Mr. Morris: Note our exception.

Attorney for the plaintiffs began to read "Report of an Accident to an Employee", attached to the depositions of the said witness Mamie Edmonson, marked Exhibit "A" thereto, and being set out in full on page 64 hereof, marked Exhibit "A", whereupon the following proceedings were had:

Mr. Morris: Before he finishes with that, we object to that, because it is incompetent as evidence, the Industrial Compensation [fol. 66] Law stating that that specific instrument shall not be introduced as evidence in the trial of a case.

The Court: How is that?

Mr. Morris: We object to that report, because it is incompetent as evidence in this case. It is made incompetent by the compensation law, and it is prejudicial to the rights of the defendants.

The Court: Does the Compensation Law say it shall not be introduced in evidence?

Mr. Morris: Yes, sir.

Mr. Howth: I will withdraw this. You will admit that he was an employee of the National Shipbuilding Co. at the time of his death?

Mr. Morris: Yes, sir.

Plaintiffs then introduced that portion of the above mentioned Report (Exhibit A) showing the wages O. O. Boudreaux was receiving at the time of his death, which was as follows:

"11. Wages, or average earnings, daily, weekly or monthly, \$300.00 per month."

Mr. Morris: We object to that on same grounds.

The Court: Overruled.

Mr. Morris: Exception.

Plaintiff next read in evidence letter from David O'Fiel to the Industrial Accident Board dated September 7, 1920, same being attached to depositions of witness Mamie Edmonson and marked Exhibit "B" thereto, as follows:

"EXHIBIT "B"

David E. O'Fiel, Attorney and Counsellor-at-Law, Alexander Bldg.,
Beaumont, Texas

Industrial Accident Board, Austin, Texas.

September 7, 1920.

[fol. 67] GENTLEMEN: On behalf of E. J. Boudreaux, R. J. Boudreaux, Mrs. E. J. Boudreaux Braud and Mary M. Boudreaux, minor, and dependent brothers and sisters of Neil Boudreaux, deceased, we wish to present their claim as dependents and for compensation on account of the death of Neil Boudreaux at Orange, Texas, on or about April 16, 1920, while on duty in the employee of the National Shipyard at Orange, Texas.

We would thank the Board to set this matter down for submission and we will submit proof of death and dependency in time for said hearing.

Awaiting your kind favor in the matter we are

Yours truly, (Signed) David E. O'Fiel.

Industrial Accident Board, State of Texas. Reed. Sep. 8, 1920.

Plaintiff next offered the date of the report of accident "Exhibit A" to the depositions of witness Mamie Edmonson, which date was "4-17-20."

Mr. Morris: We object to that, Your Honor.

The Court: Objection overruled.

Mr. Morris: Note our exception. We object to the letter of Sep. 7, 1920, because the matters stated therein are incompetent to prove any issue in the case, being mere ex parte matters.

Mr. Howth: We offer it merely for the purpose of showing notice of the claim.

Mr. Morris: There are other statements in the report, which are prejudicial to the defendants, and it is incompetent to any issue in the case.

The Court: Overruled.

Mr. Morris: Exception.

[fol. 68] Plaintiff next read in evidence Letter from David E. O'Fiel to the Industrial Accident Board dated November 22, 1920,

as follows, same being attached to the depositions of witness Mamie Edmonson, and marked Exhibit "B":

"EXHIBIT 'B'

Howth & Adams, Attorneys-at-Law, Beaumont, Texas

Nov. 22, 1920.

Industrial Accident Board, Austin, Texas.

GENTLEMEN: In the case of O. O. Boudreux vs. Nat'l. Shipbuilding Company, Orange, No. F-3777, I am inclosing you herewith Affidavits of R. J. Boudreux and Mrs. E. J. Boudreux Braud and also of E. J. Boudreux, which please file in the above entitled and numbered cause and we are advised that Miss Mary Magdaline Boudreux is forwarding her affidavit now, and if we are not able to get this affidavit to you by tomorrow, we would appreciate it, if the Board would kindly reset the case, in order that we can get it *presently*. I understand that it will be of similar purport as the ones enclosed herewith.

Thanking you for all past favors in the matter and in advance for all future favors, we are

Yours truly, (Signed) David E. O'Fiel. DEO:G.

Industrial Accident Board, State of Texas. Received Nov. 23, 1920."

Mr. Morris: We object to that for the same reasons.

The Court: Overruled.

Mr. Morris: Note our exception.

[fol. 69] Plaintiffs next read in evidence letter of April 30, 1920, from the Industrial Accident Board to Millers Indemnity Underwriters as follows, same being attached to the depositions of witness Mamie Edmonson, marked Exhibit "C", and made a part thereof:

"EXHIBIT 'C'

April 30th, 1920.

F-3777.

In re O. O. Boudreux vs. National Ship Building Co.

Millers Indemnity Underwriters, Dallas, Texas.

GENTLEMEN: Notice has been received in this Department from the National Ship Building Company of Texas to the effect that a fatal injury was sustained to O. O. Boudreux, whose address is given as Lafourche, La., on April 17th, 1920. We presume that similar notice has been sent to you.

As soon as you have made your investigation in this case, we would appreciate it if you would advise the Board your attitude with reference to the payment of compensation.

Your usual prompt attention to the matter will be greatly appreciated.

Yours very truly, Industrial Accident Board, by — — —,
Sec'y. E/L."

Mr. Morris: We object to that as being incompetent and immaterial, and matters stated therein are incompetent to prove any issue in the case, and prejudicial to the rights of the defendants.

[fol. 70] The Court: Overruled.

Mr. Morris: Note our exception.

Plaintiffs next read in evidence Letter from Bailey & Collins, managers of Millers Indemnity Underwriters, dated Dallas, Texas, May 4, 1920, to the Industrial Accident Board at Austin, same being attached to the deposition of witness Mamie Edmonson, marked Exhibit "D" thereto and made a part thereof, as follows:

"EXHIBIT 'D'

Millers Indemnity Underwriters, Dallas, Texas

SB 4648.

May 4, 1920.

Industrial Accident Board, Austin, Texas.

GENTLEMEN:

In re Your No. F 3777, O. O. Boudreaux, Deceased vs. National Ship Bldg. Company

We have the Secretary's letter of April 30th advising that notice of fatal injury had been received by the Board in case above styled. So far we have not received any notice of fatal injury or claim for compensation and will have to ask that the Board advise us of the name and address of the person filing the notice with the Board, together with the relationship of such person to the deceased before we can state what our position will be with regard to the payment of compensation.

We received a report of accident from the National Ship Building Company and have investigated the case. However, in the absence of any claim for compensation we do not think it would be proper for us to state our position with regard to payment of compensation.

Yours truly, (Signed) Bailey & Collins, Managers. HBM-e.

[fol. 71] Industrial Accident Board, State of Texas. Recd. May 6, 1920."

Mr. Morris: We object for same reasons.

The Court: Overruled.

Mr. Morris: Except.

Plaintiffs next read in evidence letter from Bailey & Collins, managers of Millers Indemnity Underwriters to the Industrial Accident

Board, dated September 17, 1920, which is attached to the depositions of the witness Mamie Edmonson, marked Exhibit "D," and made a part thereof, as follows:

"EXHIBIT 'D'

Millers Indemnity Underwriters, Dallas, Texas

SB 4648.

Sep. 17, 1920.

Industrial Accident Board, Austin, Texas.

GENTLEMEN:

In re Your No. F. 3777, O. O. Boudreaux, Deed., vs. National Ship
Bldg. Co.

In answer to the Board's letter of the 13th inst., we deny liability
for compensation to anyone in this case.

Yours truly, (Signed) Bailey & Collins, Managers. HBH-c.

Industrial Accident Board, State of Texas. Recd. Sep. 20, 1920."

Mr. Morris: We object to that for the same reasons.

The Court: Overruled.

Mr. Morris: Note our exception.

[fol. 72] Plaintiffs next offered in evidence the certificate of the deponent, Mamie Edmonson, attached to and made a part of her depositions herein, as follows:

"Industrial Accident Board, the State of Texas, Austin

I, M. Edmonson, Secretary of the Industrial Accident Board, within and for the State of Texas, do hereby certify that the attached and foregoing are true and correct copies of Report of an Accident to an Employee, letter written by the Industrial Accident Board to Millers Indemnity Underwriters, letter from David E. O'Fiel giving notice of claim for compensation of beneficiaries of O. O. Boudreaux, letters received from Millers Indemnity Underwriters and affidavits of R. J. Boudreaux, Mrs. Ed. J. Boudreaux Braud, E. J. Boudreaux and Mary Magdalene Boudreaux as the same appear of record in the case styled: O. O. Boudreaux (Deed) vs. National Ship Building Company. F-3777.

In testimony whereof, I hereunto sign my name officially and cause the seal of the Industrial Accident Board to be impressed hereon in the office of said Board in the City of Austin, Texas, on this the 9th day of January, A. D. 1922.

(Signed) M. (Mamie) Edmonson, Secretary. (Seal.)"

Plaintiffs next introduced letter addressed to the National Shipbuilding Company, Millers Indemnity Underwriters, and the Industrial Accident Board, as follows:

[fol. 73] "National Shipbuilding Company, Orange, Texas; Millers' Indemnity Underwriters, Dallas, Texas; Industrial Accident Board, Austin, Texas.

GENTLEMEN: This is to advise that E. J. Boudreaux, R. J. Boudreaux, Mary M. Boudreaux and Mrs. E. O. Braud, surviving brothers and sisters of O. O. Boudreaux, deceased are interested parties in the decree and judgment of the Industrial Accident Board rendered on the 7th day of Dec. 1920, No. F-3777 and that said parties and each of them are unwilling to abide by said final judgment and decree of said Industrial Accident Board and hereby give notice of appeal therefrom, and that said named parties and each of them will in due course of time and within the time provided by law, file suit to set said decree aside.

Respectfully, E. J. Boudreaux, R. J. Boudreaux, Mary M. Boudreaux, Mrs. E. J. Braud, by — — —, Attys. DEO: G."

Plaintiff next offered in evidence the deposition of Mrs. Ed. BRAUD.

Mr. Morris: We object to the ex parte deposition of this witness, one of the plaintiffs. Your Honor, defendants have taken the deposition of this witness ex parte, but we are not introducing this deposition.

[fol. 74] The Court: Are they filed among the papers?

Mr. Howth: Yes, sir.

Mr. Morris: It is our testimony, and we can put it in if we want to.

The Court: Is it an ex parte deposition.

Mr. Howth: Ex parte deposition taken by them, and we have no opportunity to cross them at all.

Mr. Morris: We object to all the questions and all the answers.

The Court: Overruled.

Mr. Morris: Note our exception.

The depositions of this witness were read in evidence, as follows:

My name is Mrs. Nellie Boudreaux Braud, wife of Ed Braud. My address is Lafourche, La., care of L. K. Toups. I am 36 years old. My occupation is that of Housekeeper. I have been engaged in that business or profession fifteen years; since I am married. On or about April 17, 1920, I was living right here at Lafourche, and my husband and my brother Oneal Boudreaux, supported me. No, I and my family were not well cared for and supported by the income of my husband's work and business on and prior to April 17, 1920. It is not a fact that my family was, on and before April 17, 1920 self-supporting and it is not a fact that we never were supported by charity or by other members of my father's family. Yes, my brother who died in Orange Texas, on April 17,

1920, and whose health was so bad that some weeks prior to his death I cared for him in my home while he was sick, helped to support my family. It is not a fact that my family was self-supporting on April 17, 1920 and prior to that date. Ed Braud my husband is 38 years and six months old; my children are Ena 14 years old; Hazel 11 years old; Freddie 9 years old; Edward 7 years old; Millard 6 years old: (two of my children between Millard and the baby died, one in 1918 and one in 1920) and I Lawrence 11 months. Interrogatory No. 10 asks if any person or persons [fol. 75] have ever contributed in any way to my support of my family's support, then to give the names of each person so contributing, giving the times and amounts of each contribution, to which I reply, Oneal Boudreux, my brother contributed regularly, sometimes every month and especially when we had sickness, which is most of the time; he helped to pay doctor bills too; and we have some letters showing that he sent us money, but we didn't keep them all. Ed. Boudreux is not a married Man. He was not a married man on April 17, 1920 and prior thereto. On or about April 17, 1920, Ed Boudreux was working in paper mill at Braithwaite, La. I don't know whether it is a fact that at that time he was earning his own living. I don't know whether anyone in anyway contributed to his support during the year 1920, nor, if so, who helped support him, nor the amount and date of each contribution. I don't know whether Ed Boudreux was an able bodied man on April 17, 1920, and immediately prior thereto. R. J. Boudreux is not a married man, and was not on April 17, 1920, and prior thereto. On or about April 17, 1920, R. J. Boudreux was working at the paper mill at Braithwaite, La. I don't know whether at that time he was earning his own living, and don't know who helped support him in 1920, if anyone, nor the amount and date of each contribution, nor whether he was an able-bodied man on April 17, 1920, and immediately prior thereto. It is a fact that my sister, Mary Magdalene Boudreux, is now a Nun, and during the last scholastic year taught in Rayne, Louisiana. She became a nun three years ago. It is a fact that on April 17, 1920, my said sister Mary Magdalene was teaching in Mt. Carmel Convent, New Iberia, Louisiana. As to whether, as a nun, in such convent, she was dependent upon her people or anyone of them for support, will say she asked for money and Oneal sent her some money often. As to whether it is not a well known fact that all Nuns are supported by their convents and are not allowed to have [fol. 76] support come in to an individual from the outside, they must be allowed, since she received money from Oneal.

Plaintiff's next introduced in evidence the deposition of RICHMOND WEBRE, taken by the defendant, as follows:

My name is Mr. Richmond Webre, my residence Thibodaux, La. age 49, occupation builder. I have been engated in that work

about 18 years. I am an employer of labor, working six men at the present time. Yes, Mr. Ed. Braud has been employed by me. He has been working for me about eighteen years; his first wages were \$1.50 per day; his last wages were \$4.50 per day. I have known Mr. Ed Braud since a boy; he is married; his wife's maiden name was Nellie Boudreux. Yes, Mr. Ed Braud worked for me during February, 1920, March 1920, and April 1920 up to April 17, 1920. During February his wages were \$4.50, and the same during March and April. He was a steady worker up to and prior to April 17, 1920. As to whether I ever have known Mrs. Ed Braud to receive help from charity or from her people or Mr. Braud's people, for the purpose of supporting herself or her family, will say I know nothing of their private affairs. I am acquainted with Mr. Ed. Braud's wife and children generally but not by name. I cannot say whether during the time I have known Mr. Ed. Braud and his family anyone made their home with him and his family except his wife and children. As far as I know, Mr. Ed Braud's credit is good at the business houses in the town near where he lives. I think he is able to buy on his credit from the stores in the town where he lives, groceries, dry goods and clothing. As to whether or not he is able to pay for the goods he buys on the credit, I am not familiar with his private affairs. I don't know whether or not his credit was good at the stores on and prior to April 17, 1920. He does not own any property that I know of. I don't think he owns the house where he is living. I suppose he owns the furniture in his house. He has not an automobile. I don't know what property he [fol. 77] owned on the 17th day of April, 1920. He did now own the house where he was living on April 17, 1920. I suppose he owned the furniture in his house at that time. He did not have an automobile at that time. I don't know of any other property that he owned at that time. I don't know of any separate property his wife owns in her own right. I cannot answer the 26th Interrogatory, asking me to state in detail what she owns, nor the 27th, asking whether she owned said property on April 17, 1920 and if not what property she did own at that time.

Plaintiffs next introduced the date of the filing of the original petition in this cause, showing same was filed December 10, 1920.

FERNEST DENAES, a witness called by the plaintiffs, being duly sworn, testified as follows:

Direct examination:

My name is Fernest Danaes. I live in Orange, and have lived here 4 years. Yes, I knew O. O. Boudreux. He was a diver. As to where I was when he died, will say I see him diving at the International. At the time that Boudreux died, when he was killed, when he died, I was at the National Ship Yard. At that time I was

working for the National Ship Yard. No, I don't know who Mr. Boudreaux was working for. He was working in the diver, I know. As to what company Boudreaux was working for, he worked for the National Shipbuilding Company. As to where I was when I first saw him dead, I see him in the river.

Q. Just tell the jury what you saw there. Take your time, and tell the jury what you saw.

Mr. Morris: We object to what he saw, as immaterial. He might have seen many things.

Mr. Howth: I am speaking of what he saw with reference to Boudreaux in the river.

Mr. Morris: We object to that.

[fol. 78] The Court: All right, go ahead.

Mr. Morris: Note our exception.

(Witness continued:) Well, I see that Boudreaux is dead; it looks to me like—

Mr. Morris: We object, Your Honor.

Q. Describe his appearance.

Mr. Morris: We object to what it appeared, as a conclusion of the witness.

The Court: When was that.

(Witness continues:) Yes, sir, I saw Mr. Boudreaux after he was dead; I saw him in the river at the National Shipbuilding Company. As to whether it was in the river, it was close to the river. When I saw him, he is dead, and got blue face and—

Mr. Morris: We object, Your Honor.

—and I see his arm—as to where this man was when I saw him, he was right where he worked at. I don't remember what kind of clothes he had on. He has got on his everyday working clothes. I didn't see him when they pulled him up out of the river; I seen him just after. That was about ten minutes after the whistle blew. The people said it was about twenty minutes, maybe ten minutes before four o'clock, before the whistle blowed I heard the people saying. Yes, there was a crowd at the river where I saw him. Yes, that was about ten to twenty minutes after they pulled him up. As to whether it was right near where they pulled him up, no, somebody said that the diver—

Mr. Morris: We object to what somebody said.

(Witness continues:) The diver is dead.

Mr. Morris: Wait until I get my objection.

The Court: What somebody told him?

Mr. Howth: Don't tell what anybody told you. I am just trying to get you to tell the jury what you saw, and where it was and when it was.

(Witness continues:) Well, I see him dead; that is all I see. I [fol. 79] see his face is in a bad shape.

Mr. Morris: We object to that; that is a conclusion of the witness. He might state what he saw there. Otherwise it is a conclusion as to what his face looked like.

Mr. Howth: His conclusions are admissible as to how the man appeared; that is a short-hand rendering of the facts.

(Witness continues:) That is all; I see him dead. The place where I first saw him dead was on that barge. Yes, I saw the body on the barge. That was about ten minutes before four o'clock. It was on Saturday. In was in the month of April, 1920, and on a Saturday, and about twenty or ten minutes before four. And Mr. Boudreax was dead when I saw him. Yes, I saw his body lying on the barge, and the barge was in the river, this river here at Orange, the Sabine River.

Q. All right, now, we have got that pretty definite. Now I wish you would tell the jury just how Mr. Boudreax looked, how he appeared to you.

Mr. Morris: We object to that.

Q. How the body looked, and how the face looked.

Mr. Morris: We object to that, as calling for a conclusion of the witness.

The Court: Objection overruled.

Mr. Morris: Note our exception. We object further because it is immaterial, irrelevant, and incompetent.

The Court: Overruled.

Mr. Morris: Note our exception.

(Witness continues:) As to how he looked, how his face looked, he got bad face.

Mr. Morris: We object to "bad face."

The Court: All right.

(Witness continues:) That is all I know; I see his bad face, and his arms looked tight.

[fol. 80] Mr. Morris: We object to that as a conclusion.

Mr. Howth: The Court has already passed on this. There is no use for counsel to continue to interrupt here. I am having enough trouble with this witness.

(Witness continues:) He has got bad eyes, bulged out. The color of his face was blue black. As to whether his face was its regular size or swelled out, it no swell out, just a little bit in the neck.

Mr. Morris: You understood, Your Honor, our objection goes to all this?

The Court: Yes, you can have a full bill on it.

Cross-examination:

Yes, sir, when I saw Mr. Boudreaux he was on the barge in the Sabine River; that barge was floating on the waters of the Sabine River. I have been in Orange about four years. As to whether I am acquainted with the Sabine River, or that portion of it which passes through Orange, I don't know what you say. Yes, sir, I know what the Sabine River is. Yes, sir, that is the Sabine River out here close to Orange. Yes, sir, Mr. Boudreaux was working on the Sabine River, on the waters of the Sabine River. I don't know what the tide is, ebb and flow of the tide. As to whether ships which navigate the ocean come up into the river where Mr. Boudreaux was, that is all I know; just what I told. Yes, I know what a ship is. Yes, I have seen a ship on the Sabine River. As to whether it was a ship which goes into the ocean, sails the ocean, a large ship, I don't know what you say. As to whether I have ever seen a ship in the Sabine River up as far as where Mr. Boudreaux was, or past that, I see them building ships in the ship yards.

Q. Where did they put those ships into the river?

A. What is that?

Q. You know what "where" is, don't you?

A. Where?

[fol. 81] Q. Where did they put those ships in to the river that they built in the National Ship Yards? Where did they put them into the river? Will you answer my question, or will you refuse to answer? Or what is the matter with you?

A. I don't know what you said.

(Witness continues:) Yes, I worked down at the ship yard. Yes, they told me down there what I had to do, and I understood them and did what they told me. Yes, I know what a ship is. Yes, I have seen a ship on the Sabine River where Mr. Boudreaux was. Well, yes, I have seen ships up there that sail on the ocean; they passed by there all the time. As to whether every day large ships go by there, I don't know what you said. I can't talk English very good, and that language I don't know nothing about. As to whether I worked in the ship yards down there during the war but don't know what a ship is when I see it, I know what a ship is, yes.

Q. You understood me pretty well when I asked you if you had seen ships going up and down that river?

(No answer.)

Witness stood aside.

Dr. A. G. PEARCE, a witness called by the defendants, and heard before the close of plaintiffs' testimony in order to release him, being duly sworn, testified as follows:

Direct examination:

I have been practicing medicine nearly 22 years here in Orange. I am a graduate of Tulane.

Mr. Howth: We will admit the doctor's qualifications.

(Witness continues:) I saw O. O. Boudreux in the undertaker's parlors after he was dead. Yes, sir, I saw him before he was embalmed. I will state his appearance to the best of my recollection. Dr. Phillips came and asked me to go around to see him. I did so, and my recollection is that it was after dark. I examined him for any marks on his body. I could find none, and he looked as if he [fol. 82] had died probably from some natural cause, as far as I could judge. There was no evidence of traumatism. There was no color in his face that might indicate suffocation or drowning. As to whether I found any appearance anywhere on his person indicating that he might have drowned or suffocated, no, there was nothing to suggest suffocation. His eyes were not bulged out when I saw him. There was no color in his face. I couldn't tell you to save my life what day of the week it was when I saw him. I couldn't tell you how long he had been dead; I think it was after dark when I saw him; what time he died, I don't know. As to whether it was the same day he was drowned, yes it was the same day. I understand you don't mean the day he was drowned, but the day he died. Yes, sir, if a man has been suffering from a fatty degeneration of the heart, or if a man be suffering from heart failure or a disease of the heart that results in a fatty degeneration of the muscles of the heart, it is possible that man might die even while he was asleep in bed. It is also possible that he might die while just taking ordinary exercise, such as walking, or engaged in just ordinary labor, doing nothing unusual.

Cross-examination:

Yes, sir, any of us are liable to die any time. No, I didn't see evidence where he had been hit over the head with a hammer or anything like that. I didn't see where his throat had been cut; didn't see any marks of great violence on his body. No, I did not notice a swelling about his neck. As to whether I examined him carefully to see, he was naked, lying on the undertaker's table. As to whether I just went up and glanced at him and walked off, no, Dr. Phillips and I stood there and looked at him, and discussed the case. No, we never held any post mortem. We didn't cut him open. I have no idea what caused his death. Yes, it is a fact that bulging eyes and [fol. 83] livid color of the face, and swelling of the face would indicate suffocation. By suffocation I mean asphyxiation, or lack of oxygen. Yes, sir, if this man was in a diving suit, and they pumped air down to him, and they didn't get sufficient air to him, he would die for lack of oxygen, or suffocation.

MR. AUD ARRINGTON, a witness called by the plaintiffs, being duly sworn, testified as follows:

Direct examination:

My name is Aud Arrington. I live in Orange. I don't know just exactly how long I have lived here, but it has been a pretty good while. My occupation is that of farmer; also an engineer; I have been an engineer a good deal. Yes, sir. I remember Mr. Boudreaux, the diver, and at the time he died I was working for the National Ship yard, skinning a derrick, tower man. I don't know just exactly just the length of how far I was from where he was doing his work; it was just the length of the ship, though. I was on the tower, and there was just the length of the ship where he went down. The kind of work he was doing there was diving. As to what his purpose was, well, we were fixing to launch a ship, and he was adjusting some kind of bolts, or sawing off piling, or something. He was working on the ways. Yes, sir, the ways are attached to the soil, the bank of the river. As to whether it is a sort of wharf, it is timbers to launch a ship on, and as it goes in the water, of course, it goes deeper. Yes, sir, these ways are constructed by driving piling from the shore out into the river, at right angles to the river, and sawing them off so that as they go out from the shore they are inclined. He was working on the piling in the river, which was part of the ways constructed for launching a ship, and he was diving, that is he went down in the bottom of the river in his diving suit for that purpose. He went down about one o'clock. As to how many times he came up during that afternoon, I believe that a diver is not supposed to stay under any great length of time; I don't know just how long. As to whether I know of anything [fol. 84] unusual occurring while he was down there, the boy that was holding the signal lines got uneasy.

Mr. Morris: We object to that, Your Honor.

Q. State what he said.

Mr. Morris: We object to what he said.

The Court: What is the objection?

Mr. Morris: We object to what he heard anyone say as being hearsay.

The Court: What time was that?

Mr. Howth: Right at the time.

The Court: All right, go ahead.

Mr. Morris: We object further as not part of the res gestae.

What I heard the boy holding the signal line say was after Boudreaux was dead. As to how long it was after they pulled him out, or before, they pulled him out, and got him up about ten minutes after the whistle blew, and the whistle blew at four o'clock. Yes, sir. I was there when they were trying to get him up. No, sir, they could not get him up at first. That was right about the time the whistle blew. I saw them heave on the lines, pulling on the lines,

and the man did not come up. I don't know just exactly what was the matter.

Q. If the lines—if a man down below—if Boudreaux was down below, and the lines connected with him had been unobstructed down in the river, would they have had any trouble?

A. Not a bit.

Mr. Morris: We object to that, as calling for a conclusion and leading.

The Court: Overruled.

Mr. Morris: Note our exception.

Yes, sir, I saw the men tending the lines heave on them and try to pull him up, and he didn't come. Then the head diver, old man George went down; he went and put on a helmet and went down. [fol. 85] He went down off the diving pontoon. He went down near these lines that connected to Boudreaux. He stayed down just a few minutes. Yes, sir, I saw this man George come up, the other diver. After he came up, there was some men in a skiff, the superintendent, and two or three other men; they pulled him up. They didn't have any trouble pulling him up after George went down. He came right up. When they got him up he was dead, and the plate glass window in the front of the helmet was broken, and they laid him on the pontoon. One of his big heavy lead shoes was off. I just looked through the window at his face, and it looked awful black.

Mr. Morris: We object to that.

The Court: Overruled.

Mr. Morris: Note our exception.

Yes, sir, his face looked black.

Q. Just before, and about the time George, the other diver, went down, did you hear him say anything about what he was going down for?

Mr. Morris: Object; it calls for hearsay testimony.

The Court: Overruled.

Mr. Morris: Note our exception.

Q. Did you hear the diver that went down—after you saw them heave on the lines and he didn't come up, and you saw the other diver go down, just about the time he went down, did you hear him say what he was going down for?

The Court: Mr. Morris, to save objections, I am going to rule that he can tell what he heard right there at the time, and you can have a full bill.

(Witness continues:) Well, this boy went up and got the superintendent, because they couldn't get any signals from this man, and they knew in reason that he was dead, from the length of time he had been down.

Mr. Morris: Your Honor, he is putting in a lot of conclusions of other parties and what they thought about it, and of course that is

[fol. 86] objectionable. If it is understood we will have a full bill on all those things—

The Court: You can have a full bill.

(Witness continues:) Several of them said he was dead, and old man George run in this pontoon and put on another suit and went down, and he asked the boy when he got the last signal, and he said the last signal he got from him—I forgot what time it was exactly—but he said the last signal he got was to leave him where he was at. He would be working on piling, and give the signal to give him a lift and move to another place; he signaled this boy to leave him where he was at. And after that they never got any more signals from him, and they brought him up dead. Yes, sir, I saw the men heave on the lines attached to him and couldn't bring him up. Yes, sir. I saw a diver go down and stay a few minutes, and come back, and then they had no trouble bringing him up, they pulled him up and laid him on a pontoon. No, sir, I didn't hear the diver say what he had gone down there for. As to whether I heard him say what he was going to do before he went down there, well, he said he thought he was dead, and he was going down to see about him, was about all; there was a bunch of us around there, trying to get him up; I reckon there was a dozen men in a skiff, pulling on these lines, trying to get him up, and old man George went down and came up, and in a few minutes they pulled him up. I didn't absolutely hear him say he was fouled down there—that these lines had him fastened any way. Of course, I never heard him say so, but—. Yes, sir, when they brought him up the glass was broken. As to whether or not there was any water in that diving suit, I just stayed there a few minutes, and I looked at him, and the glass was broken. Yes, sir, it was broken out in front, and broken enough for me to see his face; I didn't wait for them to pull the suit off. Yes, sir, that was Boudreux; I knew him; I had seen him at the National, and also at the International. Yes, sir, he was a strong man, and a good experienced diver, and [fol. 87] had been in the business a long time.

Q. Did you hear the men that were tending the lines say anything?

Mr. Morris: We object to that.

Q. Before they brought him up or after they brought him up, anybody working for the National Shipbuilding Company, and in connection with this repair work,

Mr. Morris: We want a full bill.

Q. Did you hear any of those say anything?

A. Yes, we talked among ourselves, working men there, that we thought he had fouled some way, by that glass being broken.

Mr. Howth: I don't call for that. I am asking you if you heard the men tending the lines say anything. We want to withdraw the discussion among the men there.

(Witness continues:) I never heard the men pumping the air or tending the lines say much about it, but they thought he had plenty

of air. I think some of them said the gauge showed he was getting plenty of air. They have got a gauge on that pump, you know, that registered the same all the time, which showed that there was sufficient air going down to him, that it couldn't have been because of the air pumps.

Cross-examination:

At the time I am talking about I was working for the National Shipbuilding Co. I was working on derrick 15, up at the bow of the ship; he was working right in the river at the lower end of it, the length of the ship from him. As to whether there were not two ways along there where I was working, and that the one I was working on was the ways next to the one he was working, on, no, sir, I think it was the one he was working on. I don't remember whether there was another ways there at that time. As to whether they were [fol. 88] taken away, yes, sir, they had been along the other side, but I don't remember whether they were removed at the time Mr. Boudreaux was drowned or not. As to whether I am absolutely positive that Mr. Boudreaux was working on the ways where this boat was or on the ways next to it, Mr. Boudreaux was working on the ways; they were fixing to launch that ship on. No, sir, it is not a fact that he was fixing to tear out those ways next to them. The ways were a good long ways apart, and he was working on the ways that they were fixing to launch the ship off. I don't know how far away that was, but it is some good little distance between the ships. It would probably from where one ways went into the river to the other ways, would be something like a hundred feet. Yes, one derrick or tower placed between the two would serve both, handle two ships. They had two derricks, one double ended and one single. The one I was working on was the double. The one facing the river, No. 15. I think I was working on a boat. I don't know how long that boat was, but it was long. It was very near finished at the time Mr. Boudreaux died; they were fixing the ways to launch it. I guess I have lived in Orange about twenty years, somewhere around there, I guess. Yes, sir, I am pretty well acquainted with the Sabine River at Orange. Yes, sir, it is a navigable stream.

Mr. Howth: We admit that.

Yes, sir, ocean going vessels come in and out of this river all the time, and the tide comes up this river, past Orange. The place where Boudreaux was working was on the Sabine River, and he was working from a barge with pumps and things on it that he was working from. It was floating on the water. As to whether it was over where he was working, it was near it; wasn't over it. His connection with the outside world came from this barge he was working from. The pump and all equipment except what he had was all on this barge or pontoon [fol. 89] toon. They carried that pontoon about, where they wanted to work. It was a floating barge. It was just a small barge, had a little house on it for him to dress in, dressing room, and pumps and equipment that they had. Just a small boat with a house built on it.

As to whether the ways next to where I was working were torn out either before or after the time that I speak of, I don't remember just when they were torn out, but usually when they launched a ship they sometimes would tear them out, if they wasn't going to build another. I don't remember whether they were torn out or not. As to whether I know what they put in there, and whether they put wharf space along there, no, sir, there was no wharf space there, only above there, didn't come down that far. No, sir, it didn't come quite to that place. As to how close I got to Mr. Boudreaux when they brought him up on the barge, why, whey they brought him up I went out and looked at him, walked right close to him and looked at him. They brought him out and laid him on a gallery they had there, on this floating barge. As to how long afterwards it was, after they got him up, that I went over there, well, I went over there before they got him up. Then I went back to the bank, and then after they got him up I went back and looked at him, and the boys said he was dead. I don't remember how long after they got him up there I went back, nor how long after they had put him on the barge it was until I went over to see him; it wasn't long, though. It was something like ten minutes, probably. I don't know how long he had been dead.

Redirect examination:

That barge did not have any means of self-propulsion; they towed it around with a skiff. I don't think it was used for any other purpose than as a diving barge; I think that was all they used it for. Mr. Boudreaux, the dead man, was working on these piling driven down [fol. 90] in the bed of the river, which were connected with the shore, the bank of the river, and were used as a skidway for boats in launching boats. When divers are under water and are getting air, you can tell it by "blubbers" coming up. As to whether or not I noticed bubbles coming up during the afternoon on which Mr. Boudreaux lost his life, I was too far away to see that, because I was on the upper end.

Recross-examination:

As to whether I know of my own knowledge what Mr. Boudreaux was doing under there, well, he was preparing these ways to launch the ship. As to whether I know that he was of my own knowledge, well, that is what they told me. I didn't go down under the water and see.

Mr. Morris: We object to that testimony; he doesn't know what this man was doing.

The Court: Overruled.

Mr. Morris: Note our exception.

Re-redirect examination:

There was no other occasion for him to go down, unless it would be to prepare these ways to launch that ship. There was nothing else for him to work on except those piling.

Re-recross-examination:

As to whether or not I know whether they were putting in piling or taking out piling, well, I can't answer that question like you asked me there, but if you will let me——. They didn't take piling out from under a ship; the ways were on top of the piling. I was not a member of his crew. I didn't have anything to do with the work he was doing. I was working in a different job, running the tower right over him, where he was working at. All I know about that is what somebody told me.

[fol. 91] W. S. WILLIAMSON, called as a witness by the plaintiffs, being duly sworn, testified as follows:

Direct examination:

My name is W. S. Williamson. I am 44 years old. I live in New Orleans. As to whether I am now living in Orange, I just dropped in a couple of days ago. In 1920 I was living here in Orange, running an engine for the National Ship Yards. I worked for them two or three different times. I worked for them altogether here in Orange about a year. In April 1920 I was in the ship yards, working, at the time. Yes, sir, on the Sabine River. I remember the occasion of the death of Mr. Boudreux, a diver, on a Saturday afternoon in April 1920. At that time I was working on a tower right just down the river from where he was diving. I would judge the tower was somewhere near a hundred feet from him. As to whether I could see him when he went down, I saw him when he left the scow or the barge; saw him when he went into the water. In the afternoon I saw him go down in the water. I am not familiar in a general way with the business of diving. I have seen them diving. I have seen them dive, and stay underneath the water, and seen them come up. When a diver is in the water, getting air, the surface immediately presents bubbles. When air is not getting to him, and air is shut off, there is no bubbles. As to whether there is a hose or pipe that carries the foul air out and another to carry the good air in, I don't know about that, but the bubbles come out underneath the water and come up. I notice during the afternoon that Boudreux was down there that bubbles stopped for a long time. I would judge that this was somewhere between two and two thirty. We made mention of it at the time. Without telling what we said, it was a matter of discussion. I saw the men that were working with him, heaving on the line connected with Mr. Boudreux's suit, to pull him up. At the time I only saw the one man, out in the skiff. The body did not [fol. 92] come up in response to the heaving, and he went back to the scow and gave instructions. I couldn't understand what they were. Mr. George Colbert went down, but not then. He had nothing on but the helmet. He pulled off all his clothes except his undersuit, and put on the helmet and went down. As to whether it was near where Mr. Boudreux was supposed to be or away from it, there was a ladder hanging off the barge, and we could trail him by the bubbles

over to where he had followed this line, and tried to pull the man up. He stayed there probably a few minutes, possibly three or four minutes, and he come right back, and began giving instructions. Then the whistle blew right at that time, and I passed out, and I never saw the man raised up. As to whether I saw him after he was dead, the whistle blowed, and we were all ready to go home, and there was a big crowd there, and I passed on out. I was not personally acquainted with Mr. Boudreux. I heard his name mentioned, and we were talking about him working with George. Of course, I could see him that distance, but a hundred feet away was I suppose as close as I was ever to the man. I know Colbert, the diver, well.

Cross-examination:

As to describing the situation as to the ways that Mr. Boudreux was working on, there was one set of ways between me and the ways he was working on. I could draw you a diagram there that would come nearer making an explanation as to the location of the ways that he was working on better than I could explain it. The ways that he was working on were vacant. I understood that they were tearing them out. I will not be positive whether there was a boat on the ways where he was working, but I am almost positive that there was not, though I couldn't be positive about that. He was working, I should judge, about thirty or thirty five feet from the shore line; 30 feet, I suppose, would cover it, from the shore. He went down into the water from the boat or scow, or whatever it was they had their equipment on. I suppose his line, life line, air line, [fol. 93] and all his connection with the outside world came from this boat or scow. I would judge its distance from the shore to be about 30 feet. As to where I was when they took out those ways, well, I was working there all the time. I don't remember whether I saw them raze any of the timbers or not. I couldn't say positively that I ever saw them raze the timbers, but I understood at the time through other parties that they were taking out the ways, and I understood that his business there was preparing to take the ways out. They do not blast those ways out, that I know of.

DEFENDANTS' EVIDENCE

L. J. KERR, called as a witness on behalf of defendants, being duly sworn, testified as follows:

Direct examination:

My name is L. J. Kerr. I live in Orange, and have lived here about four years. I was with the National Shipbuilding Company on the 17th day of April, 1920, when Mr. Boudreux died. I was foreman of launching all ships, and tending to the construction of all river work and dismantling the work in the river. I was in charge of the work Mr. Boudreux was doing. He was a diver.

I had known Mr. Boudreux about two years. As to what he had been doing prior to this time, Mr. Boudreux used to work for the International Shipbuilding Company as a diver, and on several occasions when we needed an extra diver he was working for the National Shipbuilding Co. as a relief man. As to whether I had seen him prior to this time during the prior six or eight months, I don't remember just how long it was, but we never used but the one diver up to this particular time when we needed another. Mr. Boudreux was in the service of the government and had not been back very long when the company hired him to do this particular work. I do not know what he was doing for the preceding six or eight months before he did this diving. As to the nature of the [fol. 94] work he was doing, it was a set of ways that was formerly used for launching ships and the National Shipbuilding Company decided to do away with that set of ways, or part of it, a hundred feet of it, in order to extend the wharf, and we were dismantling and cutting out those ways. There was no boat on those ways, the last one had been launched on that set of ways. We were dismantling them in order to extend the wharf so as to dismantle some boats the National Shipbuilding Company had bought. Yes, sir, we were taking those out to get the boats in. Yes, sir, that was an obstruction to navigation, and we were taking the obstruction away. No, sir, I was not present when Mr. Boudreux went down. As to whether he had gone down that day before this time, yes, sir, he went down before noon. He went down something between 11 and 12 o'clock. The purpose of going down was to get familiar with his work and see the conditions of it, what his work was. I had given him an outline of the work with the blue print, but he wanted to get familiar himself with it, and try the pressure of the air. He hadn't worked under any pressure for some time before, and he wanted to see how he would stand it. Yes, sir, he wanted to try it out, and get familiar with the work. Mr. Boudreux did not make any statement to me as to why he was going down there at that time and state his reasons for going down, other than what I have said. The place he was working from was a barge, with a house on it, and a pump set in the middle. It was a barge about 12 feet wide and possibly 18 feet long, with about an 8 x 10 cabin on it. That barge was about 35 feet from shore, out in the Sabine River, and he went down from that barge into the river. There was a ladder attached from the barge down into the water so he could go back and forth, climb up and down. This ladder did not go to where his work was, just five or six feet in the water, enough for him to submerge. No, sir, when he went down to test out the [fol. 95] apparatus, he did not find any defect in it or anything the matter with the equipment. It was working all right. There was no complaint whatever. Then he went down in the afternoon; what time it was I don't know; I wasn't there when he went down, but it was possibly after one, between one and two. As to how long it was after he went down before he was brought up, I don't know when he went down. He was brought up from below something between three and four o'clock, possibly 3:30; that was when it

was discovered there was something wrong. He was brought up about four o'clock, about when the men were knocking off, quitting work. I went to the river bank about 3:30, if I remember right, something between three and four o'clock, and I asked the tender had Mr. Boudreux been up that afternoon. He said no. I asked had he heard from him, he said no, the last time he heard from him was about an hour before, when he gave the signal to hold him where he was. I called the men to bring a skiff so I could get out there, and I got hold of his line and gave him a signal, and never got any reply to it, and I gave him a distress signal, and got no reply to that. I had seen Mr. Colbert and told him something was wrong, that I couldn't hear from Mr. Boudreux, and he said it was nothing, that he was possibly just tangled up, and so I insisted on Colbert going down, which he did, put on the helmet, and a connection from the air hose for two divers to work on, and he made his connection with the same line of hose attached to Mr. Boudreux, and he goes down and stays down not over five minutes at the longest. And he come up and said he was dead. We couldn't pull him up at first. I tried to pull him up, and he was hitched somewhere. Mr. Colbert went down and examined what it was, and there was a timber in the construction which was holding him, and we had pulled him so he come right up under the timber. His instructions to us were to pull him until he got to that timber, and [fol. 96] he would pull him over that, which he did, and we pulled him right up. Oh, no, his being over that timber would in no way keep him from signaling. His being over on the other side of that timber would in no way injure his air connection; really it would have held the hose up off of the other obstructions in the bottom. As a rule, the hose will not sink very deep; the air will keep most of them afloat. As to the condition of Mr. Boudreux's diving suit when we brought him up on the barge, his suit was puffed out as if the air was in it, the same as a balloon blown up, and the air was still in the suit. It must have been circulating in the suit, but I couldn't tell, after we got him ashore, but there was air in the suit. There was about 4 inches of water in the bottom of the suit, at the feet. The glass in front of the helmet was not broken. The first thing we done when he was brought ashore, and pulled him on the barge was to take the plate glass off, which screws in front of the helmet; that was taken off the first thing, so in case there was any life there, to let him get fresh air. Yes, sir, we screwed that glass off. There was no water in the bell or top part of that suit, only in the bottom of his shoes. A diving suit is made of one piece, including the feet and all, and you get into them from the top; feet first. There isn't any buttons or anything at all on it; it is solid, heavy canvas; around the yoke there is a rubber collar, and holes perforated into it where the breast collar comes in, and the helmet goes on and screws and makes it air and water tight. The shoes that he wore were made of solid iron, with big heavy straps to hold them on, possibly weighed thirty five pounds. When we brought him up there was one of those shoes off. The fact that the shoe was off was not responsible for the water

getting in. The shoes didn't have anything to do with water getting in. The iron shoe is used for the purpose of keeping him [fol. 97] from coming up head first, or to regulate his weight. If they didn't have the weights he couldn't stay down with that air pressure. He had a belt on him that was leaded all around, possibly weighed fifty pounds or more. In case of an accident or anything, all they have to do is take that off and get rid of that much weight. There was no obstruction that I know of to prevent his giving any sort of signal he wanted to with this life line. When I went out to the boat there was nothing to prevent him from giving a signal. Yes, sir, divers have a certain code of signals that they use in communicating with the men on the boat. There is only one man he gives signal to; that is known as his tender, the man that holds his hose and life line. In case he wants to come up or give any signal, more air, or less air, if he wants to go somewhere, or change position, he has got a signal for that, made by means of those ropes. In case of accident, it is an unusual signal; they couldn't get mixed up, because he jerks on it so that it will almost pull a man overboard. As to whether they have a signal in case they want more air or less air, in case they get too much air, he can get rid of it. The helmet has a safety valve on the helmet to regulate his air to a certain point. He can open that up and get rid of his air if he sees fit. A great many divers use their cuffs and open the cuff up and let the air out. That is where a great deal of the water gets in. There is a rubber band goes over the cuff, and to get rid of it they open that up.

Cross-examination:

I would judge that there was about four inches of water in that diving suit; yes, sir, inside the suit, about the bottom of the feet. As to whether when we brought this man to the surface after he was dead, and exposed him, took the diving suit off him, whether his eyes were bulged, popped a little, will say, yes; as soon as I saw [fol. 98] him, I knew he was dead. I saw the condition that he was in, and I knew if I didn't get the helmet off him, his face was going to be so swollen that I couldn't get it off him without cutting it off. He was swollen all over his neck and face, and had had a hemorrhage from his nose, but I wouldn't say positively about the ears. I do remember the hemorrhage from his nose. His face was a bluish cast. As to whether it was reddish bluish black cast, it wasn't black; it was reddish. Yes, it was livid. And his lips were swollen, too. I didn't see whether his tongue was thick. His face was distorted. As to whether he seemed tense, like when you tense your muscles, no, if he had been anything like that, we couldn't have gotten the suit off without cutting it. Yes, sir, I do remember his face was of a dark, red, livid appearance; his face was all out of shape; horrible condition. As to whether he looked like he had suffered agonies before his death, I wouldn't know whether he suffered any agonies, or just went off without it.

Q. If a man dies an agonized death, don't you know it shows in the face?

Mr. Morris: We object to that as a conclusion of the witness.

The Court: Overruled.

Q. Would his face impress you as a man who had suffered agony before his death?

Mr. Morris: Our exception goes to all this.

A. I couldn't tell you, because I don't know the agonies of a man when he is suffering; I couldn't answer that, because I am not in a position. But I do say that his face was swollen and out of shape, and horrible looking. As to whether this hemorrhage was a considerable hemorrhage, well it is pretty hard to tell; when I saw him there was blood on each side of his nostrils, and in that water in his [fol. 99] suit, that about 4 inches of water, there was a reddish cast, which showed there was blood in that. Yes, the water in the suit was tinged with blood. His lips were as large again as they should be. I didn't notice any froth in the mouth. No, I never noticed that. It is true that he was working for the National Shipbuilding Co. in the course of his duty as an employee at the time he met his death. As to whether he was dismantling this launching ways which connected with the shore and constructed by piling driven down in the bottom of the river, he was supposed to do it; now, whether there was ever any part of that ever done we don't know, and the work was not continued from then on. As to whether he went down with tools to do it, he went down with a cross cut saw.

Q. Now then, did Mr. Colbert tell you he was lying flat on the ground?

Mr. Morris: We object to that.

Q. Right then and there.

A. Colbert told me he was lying on the ground on the bottom of the river. Yes, sir, he told me that when he came up from the river. His work was not supposed to be on the bottom of the river; his starting point was not over six feet from the water. As to whether or not when Mr. Colbert went down there and found there was something wrong, and went down in the diving helmet, he came up and told me the man was lying down on the bottom of the river bed, yes, sir; if he was dead, he couldn't stand up. Yes, sir, he did tell me that he was lying down, not in an upright position, but in a reclining position.

Redirect examination:

Colbert went down on Boudreux's life line to where he was; he followed it on down in order to go where Boudreux was. No, sir, he didn't find any obstruction except over this timber; he wasn't down long enough to find any obstruction; not over five minutes. [fol. 100] There was no obstruction whatever in the air line to the

suit. There was no kinks in it, it was just as free as could be, nothing at all. We afterwards tested that same suit out, the following day after taking the body out. The following day we taken the suit and put the helmet on it without anyone in it, and *but* it under a twelve pound pressure and sunk it under the water, to see if there was any leaks or anything in it, and it was in first class shape: wasn't any leaks in it at all, and at the same time we tried the safety valve on the helmet and that was working all right. Yes, sir, we found everything in first class condition in the suit, and the suit was afterwards used by Mr. Colbert, and I suppose is being used yet, without making any repairs whatever; it has been used by several divers afterwards; Mr. Block used it in doing some repair work after Boudreux used it. As to whether I found any bruises on Mr. Boudreux's body, I couldn't tell you; I never saw him again.

Reeross-examination:

As to whether he was a strong man, he appeared to be in perfect health, and was in his twenties.

Dr. C. E. PHILLIPS, called as a witness for the defendants, being duly sworn, testified as follows:

Direct examination:

I am Dr. C. E. Phillips; I am practicing medicine in Orange. I have been practicing medicine since 1902.

Mr. Morris: Will you agree that Dr. Phillips is qualified.

Mr. Howth: Yes, his qualifications are agreed upon.

I was called to the National Ship Yards on April 17, 1920, to see a diver who had died in the yards. That was Mr. Onal Boudreux. I had seen Mr. Boudreux a few days before that at my office. I [fol. 101] recognized him at once. His business in coming to my office was to consult me professionally. He complained of pain over the heart and head, and also spoke about having gained in weight about forty pounds during the last few months preceding. As to whether he said why he had pain, no, he didn't know. He simply made the statement of fact. I did make an examination of him at that time. I found that upon exercise there was a slight valvular leakage, not when he didn't exercise. By valve leakage, I mean leakage of the heart valve. Yes, in other words, he had a disease of the heart. I prescribed digitalis for him. The function of that is a heart stimulant. As to whether I gave him directions about how to take care of himself, I advised him to be careful about over-working.

Mr. Howth: We object to all that, Your Honor. I don't object to his stating his examination, but about the advice to him, we think is incompetent.

The Court: Sustained.

Mr. Morris: Note our exception.

(Witness continues:) If a person is affected with that disease, the effect of exercise on that person is liable to cause an overstrain of the heart, which would produce leakage. That might cause dilatation. The dilatation is probably what caused the leakage, and it might be to such an extent that it would cause death; could be. Exercise in a person in that condition might cause death. When I examined Mr. Boudreux at the ship yard, I found him lying on a plank. As to whether that was on the barge; no, well it might have been. I wouldn't be sure, but he was lying on some plank there. I believe it was on the barge. I didn't pay any attention to that; it was right close to the river, right by the wharf. I couldn't be positive about what time of day it was, but I should judge about 4:30; it was some time in the afternoon. As to how long after his [fol. 102] death it was, they called me at once, and I went right down; I should judge probably a half hour, from the time they called me. On examination, I found no evidence of bruises, no evidence of an injury, and no water in the lungs. You ask me from my knowledge of his condition to what I attribute his death; I think his death came either from heart failure or cerebral hemorrhage, one or the other. Which, I couldn't say. But that is my opinion. No, the condition of the heart would not cause a hemorrhage. When examined Mr. Boudreux before his death, there was a condition of hardening of the arteries, what we call arteriosclerosis, not marked, but slight. We always look for cerebral hemorrhage in that condition. Yes, sir, cerebral hemorrhage might be brought on by exercise, but it might come without any; might come while he was standing on the street, smoking a cigar, or doing anything else. However, the work, or exercise, would be more apt to increase, you understand, blood pressure, and produce the cerebral hemorrhage, but it might come any time.

Cross-examination:

It might not come till old age, either. It is all a matter of speculation and theory with me. It might have been caused by cerebral hemorrhage, by which I mean a bleeding into the brain, one of the little blood vessels in the brain bursting. I don't say it was caused by that, but it might have been. If that breaking of that blood vessel, if it was a slight rupture, it might simply cause a condition of paralysis of one arm or leg, and he might live on for months or even years that way. Yes, sir, that is true. Yes, sir, men have had a slight breaking of a small blood vessel in the brain that caused a loss of use of an arm or a leg, depending on the location of the blood vessel. If the break was in the left side of the brain, it would cause a [fol. 103] paralysis on the right side, and vice versa. If it was a slight break, or a slight diffusion of blood the man might suffer the loss of the use of an arm or a leg, and be perfectly normal in other respects and live for many months, or even years. And might get well too; they do get well, sometimes. This breaking of the blood vessel is usually a condition of advanced old age or disease. As to whether it

is usually a disease of advanced old age, men of 78 or 79, will say, it is very frequently, along about fifty is a more common age for cerebral hemorrhage than real old men. Yes, sir, a great many old men die of paralysis, which is caused by breaking of blood vessel in the brain, and is also called apoplexy. Hardening of the arteries is one cause, and increased blood pressure is another. You don't necessarily have to have hardened arteries in order to have a breaking on account of increased blood pressure. As to whether you usually look for that, yes, the two frequently go together. You would not expect a young man 28 years of age to have high blood pressure, unless he had been diseased. Yes, sir, men 25 or 30 years of age usually have flexible arteries and low blood pressure. Yes, long continued and excessive use of alcohol will harden the arteries, but it takes many years to do it. Yes, sir, it takes practically a lifetime of hard drinking to harden the arteries from intoxicating liquors. As to whether, when I say that he might have died of apoplexy or cerebral hemorrhage, whether I have any fact to base that on, any diagnostic fact, or just a surmise, will say it is the logical thing to look for in that condition. In the condition that was present in that patient—by which I mean sudden death. You see a man on the street, you find him dead; we immediately say heart failure. It may be heart failure, or it may be cerebral hemorrhage. You say that is true if he was walking on the street, but that this man was down in the bottom of the river, and ask me if he might not have died of suffocation, to which I answer that he might [fol. 104] have fainted and hung himself in that case he had on; he might have, I suppose. If the pump didn't give him enough air down there, enough oxygen, I suppose he would suffocate and die. As to whether I know he would, he has to have oxygen. Yes, sir, there are two elements in the air, nitrogen and oxygen, and several others, but those are the main ones. Oxygen is the main life giving element. When the oxygen is exhausted, the man suffocates. If this pipe or hose, connected up with that diving suit, through which he got his fresh air from above, renewed his supply of oxygen as he used it up in breathing, if that had been interrupted or got mashed, or the pump wasn't giving him air, or something happened there and his oxygen was shut off several moments, he would suffocate down there under the water encased completely in that diving suit. Yes, sir, it would be like sealing him up in a coffin and burying him alive, but I think he would give a signal. I don't know whether he gave a signal or not; I am simply giving you my opinion; that is all. As to whether, just because there was a sudden death, there might have been a cerebral hemorrhage, I believe that is so. Yes, sir. I was the regular physician for the National Shipbuilding Company, and also for the Millers Indemnity Underwriters, the defendant in this case. They do not pay me a salary, but pay me by the case.

Redirect examination:

Yes, sir, an apoplectic stroke, bursting of a blood vessel in the brain, may cause sudden death, as well as paralysis, depending on the severity of the bleeding.

JOHN PATRONELL, called as a witness by the defendants, being duly sworn, testified as follows:

[fol. 105] Direct examination:

My name is John Patronell. I was in the employ of the National Shipbuilding Company on April 17, 1920, when Mr. Boudreaux was diving for that company. As to how long I had been working with Mr. Boudreaux, will say that on that ship yard, at the National, that was the first day I had worked with him there, but at the International I had worked with him five or six months. I was acquainted with his methods of doing work. That was the first day Mr. Boudreaux had worked since the time he left the International yard. The last time I seen him working over at the International, and he said he never done nothing since, that was about four or five months I never seen him. Yes, sir, this was the first day that he had worked at the National Yards. The reason I went to the National yards to work with Mr. Boudreaux, I was talking with him; I was working with Dick Hines, and he came over there and got us, me and my brother to work with him, because he knew us, and he was well satisfied with our work, was the reason he wanted us to work with him. As to what my duties were in that crew, he put me tending the life line. There are so many different ways to tend to the life line. When the diver goes down, you are supposed to give him slack, and take more slack, and any signal he gives you—more air, or one thing or another. When he goes down to work, it will be necessary for him to get wrenches and all things like that, but he went down there to cut some timber. Yes, sir, I held this line, so in case he wanted anything he could signal with this line. Yes, sir, I also held the air line that went to him. Yes, sir, I held those all the time, one in each hand. As to whether I noticed for bubbles coming from Mr. Boudreaux all the time, will say always, because Oneal, you see, had a different way. Of course, you take two men, and they don't work alike. But he didn't believe in escaping all his air, and he tried to [fol. 106] make it easy on the man at the pump as he could, and he would just let a little go out, just enough for him to get his breath, you know. Some divers open the valves wide open, and it is hard on the man at the pump; if they would kind of regulate the escape valve he wouldn't have so hard a time at the pump. Yes, sir, he went down that morning before this afternoon. It was about 11:45 when he went down, and he stayed fifteen minutes under water, to test the suit. As to whether there was any other reason for his going down that morning than to test the suit, will say, just to test the suit was all he claimed, because they had worked on it that morning, and made it for two divers, so they could work on the same machine. They connected it with one piece of pipe 5" long, and made a T connection, so when one diver went down, they could pump air for both of them. Yes, sir, he went down that morning to test his equipment. As a general rule when a man goes down, you ask him what time he wants to come up, because Oneal when he wanted to stay all evening he would tell you so, and a man wouldn't have to go ahead

and interfere with the life line. So I said, "Oneal, what time you want to come up," and he told me, "John, I came here, and long time I ain't worked, and I feel like working for the National, and tomorrow is Sunday." He wanted us to work on Sunday, and he said, "I want to go ahead and make some work, so I can get some dynamite down on Sunday." In the morning when he went down he didn't make any statement to me as to when to bring him up; he just went around and came up the ladder. As to whether the equipment was working in perfect order that morning, he was well satisfied his ownself. Yes, sir, he went down about 1 o'clock in the afternoon, and I was tending the life line and air hose. Yes, sir, I watched for bubbles, and bubbles came up all the time, even till we raised him up. If it would have stopped giving air, in five or ten minutes he wouldn't got no [fol. 107] air, and you would have had a bell of water in the suit; the pumps kept air coming all the time; I could feel it going down in the hose. I had worked with Mr. Boudreaux five or six months; helped him launch three boats at the International. During that time I had learned all this experience, and he had educated me in the way a diver did and everything, and one thing and another.

Cross-examination:

If there is a leak in the suit, and you have got plenty of air, no water can get in. A man can put a helmet on, without a suit, and but for that air the water would come up underneath and drown him, but by putting that air in there, forces the water down, and the water can't come in. I said while ago that if he hadn't been getting air the suit would have had water in it. Yes, sir, this man liked to make it easy for the man at the pump. Some divers waste the air and work the pump man pretty hard supplying air, but this man was a very considerate of the man up on the barge at the pumps and tried not to make it too hard on him. Sure I made the statement that pumping for this man Boudreaux I didn't have to pump so hard as for some other men. He saved his air, so as not to make it too hard. As to whether he did it so as to let me have a nice, easy, loafing job, will say, not to loaf. Yes, sir, the idea was not to overwork us up there. It is a fact that we didn't pump the air to him as hard as we would to any other diver, because we knew he wanted to make it easy and would save his air. You see before he went down, well, he went down and then he come up again, and he showed the boys just what kind of air he wanted, and where he wanted the gauge, and so the boys kept it there. No, sir, I am not a mechanic. As to whether I am no mechanic but just a pumper, will say I done all the best I could, and all I knew from him.

Q. I know you did; I suppose you think you did; you wouldn't [fol. 108] admit you killed that man, even if you did, would you?

Mr. Morris: We object to the side-bar remarks of counsel.

Q. You would hate to get up and tell this jury that your own carelessness or laziness caused this man's death?

A. I done my best. I don't remember that the other diver and the superintendent, Kerr, and others told me there must be something wrong down there, either before or right after we pulled him up. I don't remember that along about the middle of the afternoon I jerked on the life line for a signal and got no response. I do remember, though, that when we tried to pull him up we couldn't get him up until a diver went down there. I don't know what the diver done down there; he didn't tell me whether he untangled him or not. I couldn't tell you whether it is a fact that we couldn't pull him up until the diver went down and untangled him. Three men heaved on the line and couldn't get him up. It is also true that another diver went down in there, with just a helmet on, in that cold water, practically naked, stayed down a few minutes, and when he come up we had no trouble pulling Mr. Boudreaux up.

Redirect examination:

This diving equipment had an air gauge, and that air gauge showed the pressure to keep on that suit. Mr. Boudreaux told us to keep a pressure between five and ten pounds, and we kept that pressure all the time, and watched the gauge to see that that pressure was kept. It never got below five pounds. I couldn't see below the water. I only received one signal from him, and that was one pull, that was to leave him where he was at. I left him there. I didn't receive any signals after that. As to when was the next time I attempted to communicate with Mr. Boudreaux, you see, I ain't had no [fol. 109] more signals, and I never knew nothing about it until it came time almost for us to knock off. Until almost quitting time I didn't get any more signals. The instructions were to leave him where he was. Yes, I held the life line and hose, and the air was going down and the bubbles were coming up. About quitting time I gave him the signal to come up, and when he didn't come, I told Mr. Colbert, and they lost no time finding out, and they found he was dead. Yes, I gave him the signal about quitting time, and he didn't answer.

PLAINTIFFS' REBUTTAL TESTIMONY

The plaintiffs introduced in evidence the date of the award of the Industrial Accident Board in this case, dated December 7, 1920.

The plaintiffs also introduced in evidence Post Office Registry return receipt for the notice given, which was the letter of December 8, to the Industrial Accident Board, which is as follows:

PLAINTIFFS' EXHIBIT IN EVIDENCE

"Post Office Department, Official Business.

Penalty for private use to avoid payment of postage, \$300.
Registered Article No. 10047.

Insured Parcel No. —.

Return to Howth & Adams (Name of Sender).

Street and number or Post Office box; Post Office at Beaumont
(State), Texas.

(Reverse side:)

[fol. 110]

Return Receipt

Received from the Postmaster the Registered or Insured Article, the original number of which appears on the face of this Card.

Industrial Accident Board, signature or name of addressee.

M. Kean, signature of addressee's agent

Date of delivery, 12/10, 1920.

DR. WILT WILLIAMS, called as a witness for the plaintiffs in rebuttal, testified as follows, being duly sworn:

Direct examination:

My name is Dr. W. T. Williams. I live at Beaumont.

Agreement of Counsel. The qualifications of Dr. Williams are admitted.

I heard the testimony of Mr. Kerr, and heard him describe the appearance of the man Boudreux when he was drawn up there and his suit was opened up, the appearance of his face, and all that. From the description that Mr. Kerr gave of Mr. Boudreux, his appearance, and everything, swollen condition, livid expression, distorted features, I can say in my opinion as a medical man what caused his death.

Mr. Morris: We object to the question, because it calls for a conclusion.

Mr Howth: I know it is a conclusion; that is what I am calling for. He is an expert; a medical man.

The Court: Objection overruled.

Mr. Morris: Note our exception.

I have had about 27 years in the practice of medicine. This man died from suffocation, by which I mean lack of air. I say [fol. 111] that because it presents absolutely a typical picture of a man who had died from suffocation, lack of air, the discoloration, the bulging eyes, swelling features, distortion of the face, shows evidently he was using the muscles of his lungs and face, and all upper body for the purpose of drawing in air into his lungs.

Mr. Morris: Our objection goes to all this.

Yes, my opinion is he died of suffocation.

Cross-examination:

I never saw Mr. Boudreux in my life. I don't know anything about this case. I am basing my opinion entirely on the statement that that gentleman made over there.

DEFENDANTS' REBUTTAL TESTIMONY

Mr Barnes: We want to offer this affidavit of E. J. Boudreaux for the purpose impeaching his testimony.

Mr. Howth: If it is offered for the purpose of impeachment, we object to it because no predicate has been laid for it. But if he offers it as original testimony we don't object to it. If it is for impeachment, there was no predicate laid for it.

The Court: The objection will be sustained.

Mr. Barnes: Note our exception.

REPORTER'S CERTIFICATE

I, Will H. Campbell, Official Court Reporter for the Special Term of the District Court of Orange County, Texas, beginning on November 28, 1921, do hereby certify that the above and foregoing 63 pages comprise a true and correct statement of the facts, and all the facts, adduced in evidence on the trial of the above numbered and entitled cause, which was begun on January 30, 1922.

Will H. Campbell.

[fol. 112] STIPULATION RE STATEMENT OF FACTS

We, the below named attorneys of record for all of the parties in this cause of E. J. Boudreaux et al. vs. Millers Indemnity Underwriters, do hereby agree that the foregoing 63 (sixty three) pages of typewritten matter, with the corrections and interlineations made by the Court Reporter in purple ink, constitutes and is a full, true and correct statement of all the facts adduced in evidence on the trial of said cause, and that this is a correct statement of facts therein, and we further agree that this Statement of Facts may be filed in the District Court of Orange County, Texas, in lieu of the Question and Answer form Transcript of Testimony, and the fee for preparing same charged as costs the same as if it were the Question and Answer Form Transcript of Testimony.

Howth & O'Fiel, Attorneys for Plaintiffs. Morris & Barnes, Attorneys for defendants.

ORDER APPROVING STATEMENT OF FACTS

The foregoing is a true and correct statement of the facts adduced in evidence on the trial of said cause, and same is therefore approved and ordered filed as such.

This 23rd day of March, 1922.

J. B. Forse, Judge Presiding, Judge of the District Court of Orange County, Texas.

[fol. 113] IN DISTRICT COURT OF ORANGE COUNTY

EXHIBIT "A"—Filed April 20, 1922

Industrial Accident Board, Austin, Texas

Attention is especially called to See. 7, Part I; See. 7, Part II; and See. 3, Part IV of the Employers' Liability Act, approved March 28, 1917. Any employer who refuses or neglects to make a report required shall be punished by a fine of not more than \$1,000 for each offense. Return to be made within 3 days after accident occurs.

An answer should be made to every question.

Report of Accident to an Employee

See. A—Employer, Place, and Time

1. Employer's name: National Shipbuilding Company.
2. Office Address: City, street, and No., Orange, Texas.
3. Business (state exact nature): ____.
4. Location of plant or place where accident occurred: Street and No., ____; City or town, ____.
5. Date of Accident: 4-17-20. Day of week: Saturday. Hour of day: About 4 P. M.

See. B—Insurance

1. Are you insured to provide payment to injured employees under the Employers' Liability Act? Yes.
2. If so insured, give name and business address of the Insurance association or Company. Miller's Indemnity Underwriters.

See. C—Injured Person

1. Name of injured employee: O. O. Boudreaux.
2. Address: La Fouche, La.
3. Sex: Male.
4. Age: 40.
5. Single, married, widowed or divorced: Single.
6. Occupation when injured: Diver.
7. In what department or branch of work? Claim blanks mailed Apr. 26, 1920.
8. Was this the regular occupation of the employee? ____.
9. If not, state regular occupation. ____.
10. Was injured employee piece or time worker? ____.
11. Wages, or average earnings, daily, weekly or monthly: \$300.00 per month.
12. For what period of time had employee been in your employ prior to date of injury? First day.

Sec. D—Cause

1. Name of Machine, tool, appliance, etc., in connection with which accident occurred: _____.
2. Hand feed or mechanical: _____.
3. Describe fully how accident occurred. Was found dead on bottom of river. Industrial Accident Board, State of Texas. Recd. Apr. 26, 1920.
4. Part of machine on which accident occurred: _____.
5. Is it possible to provide a guard, safety appliance, or regulation in connection with this machine that might have prevented this accident? _____.
6. What guard, safety appliance, or regulation to guard against the injury indicated by this accident was in use when it occurred?
_____.

[fol. 114]

Sec. E—Nature of Injury

1. Part of person injured (state whether right or left in case of arms or hands, legs or feet): _____.
2. Nature of injury, as near as possible: _____.
3. Give names of all eye witnesses to accident: Superintendent Ei. R. Wieher & L. J. Kerr.
4. Attending physician and hospital where sent, name and address: Dr. Phillips & Pearce.
5. State probable period of disability (number of days employee is expected to be absent from employment) dating from day of injury:
_____.

Date of Report: 4-17-20.

National Ship Bldg. Co. of Texas

Made out by C. Tutschell, Secretary-Treasurer.

[File endorsement omitted.]

[fol. 115] [File endorsement omitted]

IN COURT OF CIVIL APPEALS FOR THE NINTH SUPREME JUDICIAL DISTRICT OF TEXAS, AT BEAUMONT

No. 874

MILLERS' INDEMNITY UNDERWRITERS, Appellant,

vs.

E. J. BOUDREAUX et al., Appellees

Appeal from the District Court of Orange County, Texas

APPELLANT'S BRIEF AND ARGUMENT IN SUPPORT THEREOF—Filed Sept. 20, 1922

APPELLANT'S ASSIGNMENTS OF ERROR

I

The Court erred to the prejudice of the defendant in overruling and refusing to sustain the defendant's motion to dismiss this cause [fol. 116] for want of jurisdiction on the ground that this cause is exclusively cognizable in a court of admiralty, because it appeared from the undisputed evidence that this cause is of an admiralty and maritime nature, in that at the time of his death, the deceased, O. O. Boudreux, was engaged in submarine diving in the waters of a public stream, to-wit, the Sabine River, at Orange, Texas, and in attempting to clear the waters of said stream, and working from and attached to a divers' barge floating upon the waters of said stream about thirty-five feet from shore, and that the said Boudreux was working from and attached to said barge by means of a life line and air hose, and by Article 3, section 2 of the Constitution of the United States, cases of an admiralty nature are placed exclusively within the jurisdiction of the courts of the United States and this being a cause of an Admiralty and maritime nature, this Court is without jurisdiction and defendant's motion to dismiss this cause upon the ground should have been sustained.

II

The Court erred to the prejudice of the defendants' motion to dismiss this cause for want of jurisdiction on the ground that this cause is exclusively cognizable in a Court of Admiralty, because it appeared from the undisputed evidence that this cause is of an admiralty and maritime nature, and this Court's refusal to sustain said motion being in effect a holding that the workmen's Compensation Law of Texas applies to admiralty and maritime jurisdiction, and therefore, being an exercise of Article 3, Section 2, of the Constitution of the United States, which article and section place the juris-

diction of admiralty and maritime cases exclusively in the Courts of the United States.

III

The Court erred to the prejudice of the defendant's motion to dismiss [fol. 117] this cause for want of jurisdiction on the ground that this cause is exclusively cognizable in a Court of Admiralty, because it appeared from the undisputed evidence that this cause is of an admiralty and maritime nature, and this Court's failure to sustain said motion being in substance and effect a holding that the plaintiff had a right of action under the Workmen's Compensation Law of Texas against the insurer, of his employer under said law in addition to the remedies given plaintiff by admiralty jurisdiction, and, therefore, was an exercise of an authority under the said Workmen's Compensation Law of Texas, in violation of the Fourteenth Amendment to the Constitution of the United States, in that it denies to this defendant the equal protection of the law, because said compensation law does not afford an exclusive remedy, but leaves the employer and his property subject to a suit in admiralty.

IV

The Court erred to the prejudice of the defendant in overruling and refusing to sustain the defendant's motion to dismiss this cause for want of jurisdiction upon the ground that this cause is exclusively cognizable in a court of admiralty, because it appeared from the undisputed evidence that this cause is of an admiralty and maritime nature and the Workmen's Compensation Law of Texas is invalid under the Constitution of the United States insofar as it applies to admiralty and maritime cases, and this being a cause arising under said compensation law, should have been dismissed.

V

The Court erred to the prejudice of the defendant in overruling and refusing to sustain the defendant's plea to the jurisdiction of this Court on the ground that this cause is exclusively cognizable [fol. 118] in a court of admiralty, because it appeared from the undisputed evidence that this is a cause of an admiralty and maritime nature, and by Article 3, section 2, of the Constitution of the United States, causes of an admiralty and maritime nature are placed exclusively within the jurisdiction of the Courts of the United States, and this being a cause of an admiralty and maritime nature, this Court is without jurisdiction, and the defendant's plea to the jurisdiction on that ground should have been sustained.

VI

The Court erred to the prejudice of the defendant in overruling and refusing to sustain the defendant's plea to the jurisdiction on the ground that this cause is exclusively cognizable in the Court of

admiralty, because it appeared from the undisputed evidence that this cause is of an admiralty and maritime nature and this Court's refusal to sustain said plea being in effect a holding that the Workmen's Compensation Law of Texas applies to admiralty and maritime jurisdiction, and therefore, being in exercise of an authority under a statute of the State of Texas in violation of Article 3, Section 2, of the Constitution of the United States, which article and section place the jurisdiction of admiralty and maritime causes exclusively in the Courts of the United States.

VII

The Court erred to the prejudice of the defendant in overruling and refusing to sustain the defendant's plea to the jurisdiction in this cause on the ground that it is exclusively cognizable in a Court of admiralty, because it appeared from the undisputed evidence that this cause is of an admiralty and maritime nature, and this court's failure to sustain said plea being in substance and effect a holding that the plaintiff had a right of action under the Workmen's Compensation Law of Texas, against the insurer of the deceased em- [fol. 119] ployer under said law in addition to the remedies given to plaintiff by admiralty jurisdiction, and therefore was an exercise of an authority under the said Workmen's Compensation Law of Texas, in violation of the Fourteenth Amendment to the Constitution of the United States, in that it denies to this defendant the equal protection of the law, because said compensation law does not afford an exclusive remedy, but leaves the employer and his property subject to a suit in admiralty.

VIII

The Court erred to the prejudice of the defendant in overruling and refusing to sustain the defendant's plea to the jurisdiction on the ground that this cause is exclusively cognizable in a Court of admiralty, because it appeared from undisputed evidence that this cause is of an admiralty nature, and the Workmen's Compensation Law of Texas, being invalid under the Constitution and Laws of the United States insofar as it applies to admiralty and maritime cases and this being a cause arising under said compensation law, said plea to the jurisdiction should have been sustained.

IX

The Court erred to the prejudice of the defendant in failing and refusing to give in charge to the jury said defendant's requested charge Number 1, being a peremptory in its favor, reading as follows:

"GENTLEMEN OF THE JURY: At the request of the Defendant you are instructed that your verdict should be that plaintiffs take nothing by their suit and that you find cause of the defendant and that you will so find."

It was error for the Court to refuse to give said charge to the jury for the following reasons:

[fol. 120] (a) Because it was established by the undisputed evidence that this cause is of an admiralty and maritime nature, and by Article 3, Section 2, of the Constitution of the United States, cases of an admiralty and maritime nature are placed exclusively within the jurisdiction of the Courts of the United States, and this court is without jurisdiction.

(b) Because it appeared by the undisputed evidence that this is the cause of an admiralty and maritime nature, and this Court's refusal to give said peremptory instructions to the jury was in effect a holding that the Workmen's Compensation Law of Texas applies to admiralty maritime jurisdiction, and therefore, was an exercise of an authority under a Statute of the State of Texas in violation of Article 3, Section 2, of the Constitution of the United States, which article and section place the jurisdiction of admiralty and maritime causes exclusively in the Courts of the United States.

(c) Because it appeared from the undisputed evidence that this is the cause of an admiralty and maritime nature, and this Court's refusal to give said charge to the jury was in substance and effect a holding that the plaintiff had a right of action under the Workmen's Compensation Law of Texas against the insurer of his employer under said law in addition to the remedies given plaintiff by admiralty jurisdiction, and therefore, was exercise of an authority under the said Workmen's Compensation Law of Texas in violation of the Fourteenth Amendment to the Constitution of the United States, in that it denies to this defendant the equal protection of the law, because said compensation law does not afford an exclusive remedy, but leaves the employer and his property subject to a suit in admiralty.

(d) Because it appeared from the undisputed evidence that this cause is of an admiralty and maritime nature, and the Workmen's Compensation Law of Texas is invalid under the Constitution of the United States in so far as it applies to admiralty and maritime [fol. 121] cases, and this being a cause arising under said compensation law, the jury should have been instructed to find for the defendant.

(e) Because it appeared from the undisputed evidence that the deceased O. O. Boudreaux, at the time of his death, was engaged in clearing a public navigable stream, to-wit, the Sabine River, at Orange, Texas, of an obstruction to navigation and commerce, and the Court's refusal to give said peremptory instructions to the jury is in violation of Article 1, Section 8 of the Constitution of the United States, in that it constitutes a regulation of and burden upon commerce among the several states.

(f) Because it appeared from the undisputed evidence that this is a cause of admiralty and maritime nature and that at the time

of his death the said O. O. Boudreux was engaged in clearing a navigable stream of an obstruction to commerce and navigation, such refusal of the Court to give said peremptory instructions to the jury is in violation of the Fourteenth Amendment to the Constitution of the United States, in that it takes the property of the defendant without due process of law.

* * * * *

X

The Court erred to the prejudice of the defendant in entering a judgment herein against this defendant upon the jury's verdict, and over the objection of the defendant for the following reasons:

(a) Because it was established by the undisputed evidence that this cause is of an admiralty and maritime nature, and by Article 3, Section 2, of the Constitution of the United States causes of admiralty and maritime nature are placed exclusively within the jurisdiction [fol. 122] of the Courts of the United States, and this Court is without jurisdiction.

(b) Because it appeared by the undisputed evidence that this is the cause of an admiralty and maritime nature, and this Court's entering said judgment was in effect a holding that the Workmen's Compensation Law applies to admiralty and maritime jurisdiction, and therefore, was an exercise of an authority under a statute of the State of Texas in violation of Section 2, of Article 3, of the Constitution of the United States which section and article place the jurisdiction of admiralty and maritime causes exclusively in the Court of the United States.

(c) Because it appeared from the undisputed evidence that this is the cause of an admiralty and maritime nature, and this Court entering said judgment was in substance and effect a holding that the plaintiff had a right of action under the Workmen's Compensation Law of Texas against the insurer of his employer under said law in addition to the remedies given, by admiralty jurisdiction, and therefore, was an exercise of an authority under the said Workmen's Compensation Law of Texas in violation of the Fourteenth Amendment of the Constitution of the United States, in that it denies to this defendant the equal protection of the law, because said compensation law does not afford an exclusive remedy, but leaves the employer and his property subject to a suit in admiralty.

(d) Because it appeared from the undisputed evidence that this cause is of an admiralty and maritime nature, and the Workmen's Compensation Law of Texas is invalid under the Constitution of the United States in so far as it applies to admiralty and maritime cases, and this being a cause arising under said compensation law, it is error for the Court to enter said judgment against this defendant.

[fol. 123] (e) Because it appeared from the undisputed evidence that the deceased O. O. Boudreux at the time of his death was engaged in clearing a public navigable stream, to-wit, the Sabine River at Orange, Texas, of an obstruction of navigation and commerce, and said judgment is in violation of Article 1, Section 8, of the Constitution of the United States, in that it constitutes a regulation of and burden upon commerce among the several states.

(f) Because it appeared from the undisputed evidence that this is a cause of an admiralty and maritime nature, and that at the time of his death the said O. O. Boudreux was engaged in clearing a public navigable stream of an obstruction to commerce and navigation and said judgment is in violation of the fourteenth Amendment to the Constitution of the United States, in that it takes the property of the defendant without due process of law.

* * * * *

XXII

The Court erred in incorporating in its judgment the following finding:

"And all other facts necessary to plaintiff's recovery being admitted and undisputed."

This was error for the following reasons:

(a) Before trial of the cause, the defendant filed its first amended original answer in which was contained a general denial and special denial, as well as exceptions and demurrs, as it appeared to defendant from said action, putting the plaintiff upon proof of every fact and issue necessary to constitute a recovery for her in this cause, and upon the trial of said cause only one admission and agreement was made and that was that the deceased, O. O. Boudreux [fol. 124] was working in the course of his employment for the National Shipbuilding Company at the time of his death.

(b) There is no evidence that this Court has jurisdiction of this cause, it appearing from the undisputed evidence that this is a cause of an admiralty and maritime nature, and it was not admitted that this Court has jurisdiction.

* * * * *

[Title omitted]

Statement of the Nature and Result of the Suit

This suit was instituted on December 10, 1920, by E. J. Boudreux, R. J. Boudreux, Mary M. Boudreux and Mrs. E. J. Braud, joined pro forma by her husband, E. J. Braud, and by an amended petition filed on the day of the trial, to-wit January 30, 1922, and upon [fol. 125] which the cause went to trial, said plaintiffs alleged sub-

stantially that they are the surviving brothers and sisters of O. O. Boudreaux, deceased, who was employed as a diver by the National Shipbuilding Company, at Orange, Texas, that 60% of the average weekly wage of the said O. O. Boudreaux amounted to more than \$15.00 per week; and that they were dependent upon the wages of the said O. O. Boudreaux for support; that on the 17th day of April, 1920, said O. O. Boudreaux was sent below by his employer to perform his task as a diver, and upon belief, they allege that while under the water, the supply of air furnished the said Boudreaux became fouled, or that he was furnished an insufficient supply of air, or that in some manner the supply of air was cut off for the time being, so that the said O. O. Boudreaux died from suffocation; that notice of his death and claim for compensation therefor were given to his employer, the Industrial Accident Board and Millers Indemnity Underwriters, within the time provided by law, and that on the 7th day of December, 1920, the Industrial Accident Board made an award from which the said surviving brothers and sisters desired to appeal, and that within twenty days after said award was made, notice was given to the Industrial Accident Board and to Millers Indemnity Underwriters that suit would be filed within the time required by law to set aside said award, and that this suit was so filed, the award being attached as Exhibit A to their said petition. Plaintiffs prayed that said award be set aside, for compensation on account of the death of O. O. Boudreaux, and in the alternative for burial expenses of \$500.00, for general and special relief, etc.

To this petition on the same date, the defendant, appellant here, filed its amended answer, containing: A plea to the jurisdiction of the Court, on the ground that the death occurred on the waters of a navigable stream, the Sabine River, while the deceased was engaged [fol. 126] as a diver in a maritime employment of removing an obstruction to commerce from beneath the waters of said river, a general demurrer, general denial, and that plaintiffs failed to comply with the provisions of the Compensation Law in regard to giving notice of the death of O. O. Boudreaux, filing claim therefor, and in failing to give notice of appeal from the award of the board, and filing suit within the time required by law, and among other things denied that the plaintiffs or either of them were dependents upon the deceased, and pleaded further that deceased died from a disease of the heart.

At the conclusion of the evidence, to-wit, January 31, 1922, appellees dismissed their suit as to all plaintiffs except Mrs. E. J. Braud and husband, and appellant then presented its motion to the Court to dismiss this cause for want of jurisdiction on the ground that the cause is exclusively cognizable in a Court of Admiralty, which was by the Court overruled, and to which appellant excepted. The defendant then requested a peremptory instruction to the jury in its favor, which was refused, on February 1, 1922. Over the objection of appellant the Court then submitted the case to the jury. The charge was upon special issues supplemented by special requested instructions, given at the request of appellant, and the issues found

by the jury were construed by the Court to be favorable to appellees, and upon motion of appellees, judgment thereon was entered in their favor on April 22, 1920, declaring a part of said sum due, etc.

On the 3rd day of February, 1922, appellant filed its motion for a new trial, containing its assignments of error, and said motion was by the Court overruled on the same day, to which ruling the appellant in open Court duly excepted, and the Court gave appellant sixty [fol. 127] days in addition to the time allowed by law to have prepared and filed its bills of exception, transcript and Statement of Facts.

Appellant filed its supersedeas bond on February 14, 1922, and its bills of exception and duplicate copy of the Statement of Facts with the lower Court in proper time, and the transcript and Statement of Facts with this Honorable Court, in the manner and within the time required by law, and did and performed all things necessary for this appeal, and this cause is now properly before your Honors for review and correction.

Points upon Which the Appeal is Predicated

One

It appearing from the undisputed evidence that the deceased, O. O. Boudreaux, at the time of his death was engaged in submarine diving in the waters of a public navigable stream, attempting to clear the waters of said stream of an obstruction to navigation beneath the waters of said stream, and working from and attached to a barge floating upon the waters of said stream about thirty-five feet from shore, and that he was working from and attached to said barge by a life line and air hose being his only connection with the outside world, the cause of action for his death while so engaged is of an admiralty and maritime nature, and exclusively cognizable in a Court of Admiralty by virtue of Article 3, Section 2, of the Constitution of the United States. (Germane to assignments Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 and 22.)

Second

It appearing from the undisputed evidence that this cause was of an admiralty and maritime nature, the action of the District Court of Orange County, Texas, in entering judgment against appellant under the Workmen's Compensation Law of Texas, was an erroneous [fol. 128] exercise of authority under a Statute of the State of Texas, in violation of Article 3, Section 2 of the Constitution of the United States, which Article and Section place the jurisdiction of Admiralty and maritime cases exclusively in the Courts of the United States. (Germane to assignments Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 and 22.)

Third

It appearing from the undisputed evidence that this cause was of an admiralty and maritime nature, the action of the Court in enter-

ing judgment against appellant was an erroneous holding that appellee had a right of action under the Workmen's Compensation Law of Texas against appellant in addition to the remedies given appellees by admiralty jurisdiction, and was an exercise of an authority under said Workmen's Compensation Law of Texas in violation of the Fourteenth Amendment to the Constitution of the United States, in that it denies to appellant the equal protection of the law, because said compensation law does not afford an exclusive remedy, but leaves the employer and his property subject to a suit in admiralty, and the insurer under the compensation law of Texas liable to pay such judgment, subjecting it to double damages. (Germane to assignments Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 and 22.)

Fourth.

The Workmen's Compensation Law of Texas is invalid under the Constitution of the United States in so far as it applies to admiralty and maritime causes, and the undisputed evidence showing this to be a cause of admiralty and maritime nature, this cause should have been dismissed for want of jurisdiction. (Germane to assignments Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 and 22.)

[fol. 129]

Fifth

It appearing from the undisputed evidence that this is a cause of admiralty and maritime nature, the action of the Court in rendering judgment against appellant under the Workmen's Compensation Law of Texas, is in violation of the Fourteenth Amendment to the Constitution of the United States because it deprives the appellant of its property without due process of law. (Germane to assignments Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 and 22.)

Sixth

It appearing that the deceased was engaged in clearing a public navigable stream of an obstruction to commerce the action of the Court in entering judgment against the appellant was a holding that the Workmen's Compensation Law of Texas applies to interstate Commerce, and therefore being an exercise of an authority under said Workmen's Compensation Law in violation of Article 1, Section 8 of the Constitution of the United States, in that it constitutes a regulation of and burden upon commerce among the several states. (Germane to assignments Nos. 9, 10 and 22.)

Brief of the Argument

Argument under Propositions 1 to 6, Inclusive

We would call the Court's attention to the fact that the undisputed evidence shows that the deceased's contract of employment was of an admiralty nature, the work in which he was engaged was of an

admiralty nature, and the place where the injury occurred places the cause within the admiralty jurisdiction. We would further call the Court's attention to the fact that there is not a scintilla of evidence either that the employer of the deceased was a subscriber under [fol. 130] the Compensation Law of Texas, or that the appellant was its insurer, and by our discussion of the admiralty feature of the case, we do not concede that the Workmen's Compensation Law of Texas could apply to this cause in any event.

Plaintiff's witness, Fernest Denae, states:

"Yes, sir, when I saw Mr. Boudreux he was on the barge in the Sabine River; that barge was floating on the waters of the Sabine River. I have been in Orange about four years. As to whether I am acquainted with the Sabine River, or that portion of it which passes through Orange, I don't know what you say. Yes, sir. I know what the Sabine River is. Yes, sir, Mr. Boudreux was working on the Sabine River, on the waters of the Sabine River" (S. F. p. 36.)

Plaintiff's witness, and Arrington, states:

"I guess I have lived here in Orange about twenty years, somewhere around there, I guess. Yes, sir, I am pretty well acquainted with the Sabine River at Orange. Yes, sir, it is a navigable stream."

Mr. Howth: We admit that.

Yes, sir, ocean going vessels come in and out of this river all the time, and the tide comes up this river past Orange. The place where Boudreux was working was on the Sabine River, and he was working from a barge with pumps and things on it that he was working from. It was floating on the water. As to whether it was over where he was working, it was near it; wasn't over it. His connection with the outside world came from this barge he was working from. The pump and all equipment except what he had was all on this barge or pontoon. They carried that pontoon about, where they wanted to work. It was a floating barge. It was just a small barge, [fol. 131] had a little house on it for him to dress in, dressing room, and pumps and equipment that they had. Just a small boat with a house built on it." (S. F. pp. 43-44.)

Defendant's witness L. J. Kerr testified:

"My name is L. J. Kerr. I live in Orange and have lived here about four years. I was with the National Shipbuilding Company on the 17th day of April, 1920, when Mr. Boudreux died. I was foreman of launching all ships, and tending to the construction of all river work and dismantling the work in the river. I was in charge of the work Mr. Boudreux was doing. He was a diver. I had known Mr. Boudreux about two years. As to what he had been doing prior to this time, Mr. Boudreux used to work for the International Shipbuilding Company as a diver, and on several occasions

when we needed an extra diver he was working for the National Shipbuilding Company as a relief man. As to whether I had seen him prior to this time during the prior six or eight months, I don't remember just how long it was, but we never used but the one diver up to this particular time when we needed another. Mr. Boudreaux was in the service of the government and had not been back very long when the company hired him to do this particular work. I do not know what he was doing for the preceding six or eight months before he did this diving. As to the nature of the work he was doing, it was a set of ways that was formerly used for launching ships and the National Shipbuilding Company decided to do away with that set of ways, or part of it, a hundred feet of it, in order to extend the wharf, and we were dismantling and cutting out those ways. There was no boat on those ways, the last one had been launched on that set of ways. We were dismantling them in order to extend the wharf so as to dismantle some boats the National Shipbuilding Company [fol. 132] had bought. Yes, sir, we were taking those out to get the boats in. Yes, sir, that was an obstruction to navigation, and we were taking the obstruction away. No, sir, I was not present when Mr. Boudreaux went down. As to whether he had gone down that day before this time, yes, sir, he went down before noon. He went down something between 11 and 12 o'clock. The purpose of going down was to get familiar with his work and see the conditions of it, what his work was, I had given him an outline of the work with the blue print, but he wanted to get familiar himself with it, and try the pressure of the air. He hadn't worked under any pressure for some time before, and he wanted to see how he would stand it. Yes, sir, he wanted to try it out, and get familiar with the work. Mr. Boudreaux did not make any statement to me as to why he was going down there at that time and state his reasons for going down, other than what I have said. The place he was working from was a barge, with a house on it, and a pump set in the middle. It was a barge about 12 feet wide and possibly 18 feet long, with about 8 x 10 cabin on it. That barge was about 35 feet from shore, out in the Sabine River, and he went down from that barge into the River. There was a ladder attached from the barge down into the water so he could go back and forth, climb up and down. This ladder did not go to where his work was, just five or six feet in the water, enough for him to submerge. No, sir, when he went down to test out the apparatus, he did not find any defect in it or anything the matter with the equipment. It was working all right. There was no complaint whatever. Then he went down in the afternoon; what time it was I don't know; I wasn't there when he went down, but it was possibly after one, between one and two. As to how long it was after he went down before he was brought up. I don't know when he went down. He was brought up from below something between three and four o'clock, possibly 3:30; that was when it was discovered [fol. 133] there was something wrong. He was brought up about four o'clock, about when the men were knocking off, quitting work. I went to the river bank about 3:30, if I remember right, something

between three and four o'clock, and I asked the tender has Mr. Boudreaux been up that afternoon. He said no. I asked him had he heard from him; he said no, the last time he heard from him was about an hour before, when he gave the signal to hold him where he was. I called the men to bring a skiff so I could get out there, and I got hold of his line and gave him a signal, and never got any reply to it, and I gave him a distress signal, and got no reply to that. I had seen Mr. Colbert and told him something was wrong; that I couldn't hear from Mr. Boudreaux, and he said it was nothing, that he was possibly tangled up, and so I insisted on Colbert going down, which he did, put on the helmet, and a connection with the same line of hose attached to Mr. Boudreaux, and he goes down and stays down not over five minutes at the longest. And he come up and said he was dead. We couldn't pull him up at first. I tried to pull him up, and he was hitched somewhere. Mr. Colbert went down and examined what it was, and there was a timber in the construction which was holding him, and we had pulled him so he come right up under the timber. His instructions to us were to pull him until he got to that timber, and he would pull him over that, which he did, and we pulled him right up. O, no, his being over that timber would in no way keep him from signaling. His being over on the other side of that timber would in no way injure his air connection; really it would have held the hose up off of the other obstruction in the bottom. As a rule, the hose will not sink very deep; the air will keep most of them afloat. As to the condition of Mr. Boudreaux's diving suit when we brought him up on the barge, [fol. 134] his suit was puffed out as if the air was in it, the same as a balloon blown up, and the air was still in the suit. It must have been circulating in the suit, but I couldn't tell, after we got him ashore, but there was air in the suit. There was about 4 inches of water in the bottom of the suit, at the feet. The glass in the front of the helmet was not broken. The first thing we done when he was brought ashore, and pulled him on the barge was to take the plate glass off, which screws in front of the helmet; that was taken off the first thing, so in case there was any life there, to let him get fresh air. Yes, sir, we screwed that glass off. There was no water in the bell or top part of that suit, only in the bottom of his shoes. A diving suit is made of one piece, including the feet and all, and you get into them from the top, feet first. There isn't any buttons or anything at all on it; it is solid, heavy canvass; around the yoke there is a rubber collar, and holes perforated into it where the breast collars come in, and the helmet goes on and screws and makes it air and water tight. The shoes that he wore were made of solid iron, with big heavy straps to hold them on, possibly weighed thirty-five pounds. When we brought him up there was one of those shoes off. The fact that the shoe was off was not responsible for the water gettin- in. The shoes didn't have anything to do with water getting in. The iron shoe is used for the purpose of keeping him from coming up head first, or to regulate his weight. If they didn't have the weights he couldn't stay down with the air pressure. He had a belt

on him that was loaded all around, possibly weighed fifty pounds or more. In case of an accident or anything, all they have to do is take that off and get rid of that much weight. There was no obstruction that I know of to prevent his giving any sort of signal he wanted to with this life line. When I went out to the boat there [fol. 135] was nothing to prevent him from giving a signal. Yes, sir, divers have a certain code of signals that they use in communicating with the men on the boat. There is only one man he gives the signals to; that is the one known as his tender, the man that holds his hose and life line. In case he wants to come up or give any signal, more air, or less air, if he wants to go somewhere, or change position, he has got a signal for that, made by means of those ropes. In case of accident, it is an unusual signal; they couldn't get mixed up, because he jerks on it so that it will almost pull a man overboard. As to whether they have a signal in case they want more or less air, in case they get too much air, he can get rid of it. The helmet has a safety valve on the helmet to regulate his air to a certain point. He can open that up and get rid of his air if he sees fit. A great many divers use their cuffs, and open the cuff up and let the air out. That is where a great deal of the water gets in.

There is a rubber band goes over the cuff, and to get rid of it they open that up." (S. F. pp. 47-51.)

The jury found that Boudreux died from suffocation. (Tr. p. 24.) No defect was found in the equipment, and the diver who went down to Boudreux found no entanglements of the air line. The plaintiff's witness, Nick Kahl, states that the lack of air could be caused from a defect in the pumps. He states "The pump might be working and not give sufficient air. (S. F. p. 4.)

There is absolutely no testimony in the record that the National Shipbuilding Company was a subscriber under the Compensation Law of Texas at the time of Boudreux's death, and there is no evidence that the Millers Indemnity Underwriters had any connection with this case. The award made by the Industrial Accident Board, or rather the refusal of the Board to award compensation to anyone, was not introduced in evidence. The report of death of O. O. [fol. 136] Boudreux, made as "Exhibit A" to the Statement of Facts on page 64 thereof was excluded by the Court, except the date thereof and the item contained therein that Boudreau's wage was \$300.00 per month, and all of said report is incompetent as is especially provided by the Compensation Law.

Appellant interposed a plea to the jurisdiction, raising the admiralty question (Tr. p. 11), and at the conclusion of the evidence presented its motion to dismiss this cause (Tr. p. 15). Appellant also asked for an instructed verdict (Tr. p. 24) and took due exception to the action of the Court in entering judgment against it. See defendant's Bill of Exception 1 and 2 (Tr. pp. 26, 29.)

Regardless of whether or not the provisions of the Compensation Law had been invoked, the facts very plainly established that this

is a cause exclusively cognizable in a Court of Admiralty, and that the District Court of Orange County, Texas, had no jurisdiction thereof at any event. The Court will take judicial knowledge of the fact that the Sabine River, upon the waters of which this death occurred, is not within the boundaries of the State of Texas, but that it forms the boundary line between the States of Louisiana and Texas. It is undisputed that this is a navigable stream, and it is undisputed that the death occurred upon the waters of this stream. This being an action of tort, the place where the tort was committed fixes the jurisdiction. As said in the very recent case of *Grant-Smith Porter Ship Co. vs. Herman F. Rhode*, U. S. Supreme Court decision, (February Advance Sheet). "The general doctrine that, in contract matters, admiralty jurisdiction depends upon the nature of the transaction, and in tort matters upon the locality, has been so frequently asserted by this Court that it must now be treated as settled." The Supreme Court cites many cases [fol. 137] in support of the doctrine announced. We consider this purely an action of tort, and the nature of the contract is immaterial, since the tort happened upon navigable waters. However, the contract of employment, as well as the nature of the work was maritime. Mr. Boudreux was employed as a marine diver. He was working from a floating barge, and his work was to remove an obstruction to commerce from the bed of the Sabine River. In this case, the employment or consent is maritime in its nature and the rights and liabilities of the parties is prescribed by general rules of maritime law essential to its proper harmony and uniformity. See *Southern Pac. Ry. Co. vs. Jensen* 244 U. S. 205, 61 L. Ed. 1086, L. R. A. 1918, C. 451, 14 N. C. C. A. 596, *Chelentix vs. Luckenback S. S. Co.* 247 U. S. 372, 62 L. Ed. 1191, 19 N. C. C. A. 309, *Union Fish Co. vs. Erickson*, 248 U. S. 308, 63 L. Ed. 261, *Knickerbocker Ice Co. vs. Stewart* 253 U. S. 149, 64 L. Ed. 834.

That the boat upon which he was working, or rather from which he was working, is a vessel within admiralty, we cite the cases of *In re P. Sanford Ross*, 196 Fed. 921, *Charles Barnes vs. One Dredge Boat* 169 Fed. 895, L. e. 897, *Bowers Hydraulic Dredging Company vs. Federal Contracting Company* 148 Fed. 290.

The work on a pile driver has been held to be maritime work in the case of *Lawrence vs. Flatboat*, 84 Fed. 200. The fact that Boudreux went below to work upon piling under the water, driven into the bed of the river, does not keep it from being a maritime tort. See *The Blackheath* 195 U. S. 361, 49 L. Ed. 236. In 1 C. J. 1287, it is said "Where the consummation of the injury happens upon navigable water, the case is one within the admiralty jurisdiction, and it is immaterial that it originated on land. And the rule applies where the injury is done by the land itself or property attached to the land; thus, admiralty has jurisdiction over an injury to a vessel on navigable water caused by a defective pier or wharf, or by a bridge or draw."

[fol. 138] Now, if we take the theory of the case that Boudreux's death was caused from the pumps not giving sufficient air, then,

the ways attached to the bottom of the river had nothing to do with it. In view of the jury's verdict, it seems that this theory is the only tenable one, for no entanglements were discovered in the air line leading to Boudreaux' body. If that is the case, the cause of the death originated and culminated upon the vessel, and is purely maritime in its nature. But if the theory that Boudreaux's air line became entangled in the timbers is adopted, the cause of the death is none the less maritime. Every species of tort, however occurring, and whether on board a vessel or not, if upon the high seas, or navigable waters, is of admiralty cognizance. The Plymouth 3 Wall. 20, 36, 18 L. Ed. 125; Proctor *vse.* Dillon 235 Mass. 541.

In our assignments and propositions we have endeavored to raise all the objections that were leveled at the judgment of the Court in the case of Southern Pacific *vs.* Jensen 244 U. S. 205, 61 L. Ed. 1086, and in the case of Home Life and Accident Company *vs.* Wade, recently decided by this Honorable Court, and we submit that this cause should be disposed of in the same manner, reversed and rendered.

Argument under Seventeenth Proposition

The Court incorporated the following clause in its judgment:

"* * * * and all other facts necessary to plaintiff's recovery being admitted and undisputed."

To this action of the Court, the defendant took due exception, see Bill of Exception No. 2, Tr. p. 29. The proposition refers to the assignments on this point.

[fol. 139] There being no evidence to sustain such a finding, no other statement is necessary.

The plaintiff's failed to submit evidence to prove their cause of action in many respects, and hence we submit this proposition. The judgment must have evidence to support it. It cannot be bolstered up by false statements on its face. See R. S. Art. 1895, Wahl *vs.* Ramsey, 218 S. W. 559.

Conclusion

We think we have successfully demonstrated that the Court below was without jurisdiction to try this cause and that the same should be here reversed and rendered.

If we are in error as to this, then, we submit that the plaintiffs have failed to make a case against the defendant in that essential elements of proof are lacking, and on that ground, appellant is entitled to have this cause reversed and rendered.

In the alternative, appellant prays that, on account of the many manifest errors complained of, this cause be reversed and remanded.

Respectfully submitted, Morris & Barnes, Attorneys for Appellants. J. B. Morris, of Counsel.

IN COURT OF CIVIL APPEALS

[Title omitted]

JUDGMENT—Filed November 23, 1922

[fol. 140] This cause came on to be heard on the transcript of the record, and, the same being inspected, because it is the opinion of the Court that there was no error in the judgment; it is therefore considered, adjudged and ordered that the judgment of the Court below be in all things affirmed: That the appellant, Millers Indemnity Underwriters, and the surety on its Supersedeas Bond, Subscribers at American Lloyds of Dallas, composed of the following:

Bailey & Collins, 15.2%, Vose, Alden H., 5%, Wooten, R. L. 5%, Collins, Carr P. 3½%, Simmons, J. W. Jr., 3%, Vose, R. A. 2½%, Chatfield, Geo. A. 2%, King, A. E. 2%, Jones, Roy B. 1½%, Anderson, F. E. 1¼%, Clayton, Benj. 1¼%, Clayton, W. L. 1¼%, Aldridge, J. H. 1%, Ambrister, W. E. 1%, Anderson, B. L. 1%, Astin, E. H. 1%, Bell, Bryan 1%, Bellis, J. H. 1%, Bond, Danile, 1%, Byram, J. E. 1%, Cash, Benj. D. 1%, Fain, Earl, 1%, Fix, G. G. 1%, Fortson, Joe B. 1%, Fortson, Jno. T. 1%, Frierson, A. A. 1%, Geer, B. E. 1%, Golding, Chas. D. 1%, Geer, D. Edward, 1%, Hamilton, G. M. 1%, Hamilton, R. L. 1%, Head, W. B. 1%, Hobby, Edwin, 1%, Houston, H. B. 1%, Hudgins, John A. 1%, Hutson, L. C. 1%, Ives, C. L. 1%, Kennedy, J. B. 1%, Kuttchart, E. R. A. 1%, Lawton, J. J. 1%, Le Clercq, J. R. Sr. 1%, Le Clercq, J. S. Jr. 1%, Lipscomb, J. N. 1%, Lowe, W. D. 1%, Mitchell, Homer R. 1%, Norwood, J. W. 1%, Oliver, R. 1%, Pendleton, W. R. 1%, Simmons, R. M. 1%, Smith, F. M. 1%, Sypert, W. S. 1%, Timberlake, C. F. 1%, Trimble, E. G. 1%, Underwood, J. A. 1%, Woodall, Ed. 1%, Bell, H. R. ½ of 1%, Caldwell, J. B. ½ of 1%, Crow, R. F. ½ of 1%, Davis, T. J. ½ of 1%, Dillingham, E. K. ½ of 1%, Duke, C. L. ½ of 1%, Garrow, H. W. Jr. ½ of 1%, Hulsey, B. B. ½ of 1%, Kennedy, R. A. ½ of 1%, Moughon, E. D. ½ of 1%, Myers, W. Jr. ½ of 1%, Robinson, O. B. ½ of 1%, Sherman, W. A. ½ of 1%, [fol. 141] Smith, Loyd B. ½ of 1%, Trippe, C. G. ½ of 1%, Van Ness, J. R. ½ of 1%, Wilbor, S. W. ½ of 1%, and Wise, E. L. ½ of 1%, shall perform the judgment of this court and of the court below, pay all costs in this behalf expended, and this decision be certified below for observance.

[File endorsement omitted.]

IN COURT OF CIVIL APPEALS

[Title omitted]

OPINION—Filed Nov. 19, 1922

This suit was instituted in the District Court of Orange County by appellees against appellant to set aside the award which the Industrial Accident Board had made in appellant's favor denying liability for the death of O. O. Boudreux, under the provisions of the Workmen's Compensation Act. All the brothers and sisters of O. O. Boudreux, deceased, were parties plaintiff in the original petition, but before judgment was entered, all of them except his sister Mrs. E. J. Braud and her husband were dismissed from the suit. The case was tried to a jury on the following special issues, which were answered as indicated:

(1) "Was the death of O. O. Boudreux from natural causes, or was it caused from suffocation?"

Answer: "From suffocation."

(2) "Did the deceased O. O. Boudreux contribute to the support of Mrs. E. J. Braud?"

Answer: "Yes."

(3) "Was Mrs. E. J. Braud dependent upon the deceased O. O. Boudreux for support in whole or in part?"

Answer: "In part."

[fol. 142] (4) "What amount of money would sixty per cent of O. O. Boudreux's weekly wages be for 360 weeks?"

Answer: "\$16,200.00."

On the verdict of the jury thus returned, judgment was entered in favor of Mrs. E. J. Braud for the compensation allowed by law. Appellant has duly perfected its appeal from this judgment. The facts are disclosed in the opinion.

We will first consider appellant's proposition that appellees' cause of action, if any they had, was of an admiralty and maritime nature, and exclusively cognizable in a court of admiralty; that as applied to the facts of this case the Workmen's Compensation Act of this state is violative of Article 3, Section 2, Art. 1, Sec. 8 and the 14th Amendment of the Federal Constitution, and that the District Court of Orange County had no jurisdiction over plaintiffs' cause of action, and its judgment on the merits was, therefore, void and of no effect. On this issue the facts are as follows:

At the time of his death, O. O. Boudreux was employed by the National Shipbuilding Company as a diver, and was working in the waters of the Sabine River, a navigable stream between Texas and Louisiana. In the full equipment of a diver, he was sent down into the waters of this river from a barge. Mr. Arrington testified:

"Yes, sir, ocean going vessels come in and out of this river all the time, and the tide comes up this river, past Orange. The place where Boudreux was working was on the Sabine River, and he was work-

ing from a barge with pumps and things on it that he was working from. It was floating on the water. As to whether it was over where he was working, it was near it; wasn't over it. His connection with the outside world came from this barge he was working from. The [fol. 143] pump and all equipment except what he had was all on this barge or pontoon. They carried that pontoon about, where they wanted to work. It was a floating barge. It was just a small barge, had a little house on it for him to dress in, dressing room, and pumps and equipment that they had. Just a small boat with a house built on it."

We also quote as follows from the testimony of L. J. Kerr:

"My name is L. J. Kerr. I live in Orange, and have lived here about four years. I was with the National Shipbuilding Company on the 17th day of April, 1920, when Mr. Boudreux died. I was foreman of launching all ships, and tending to the construction of all river work and dismantling the work in the river. I was in charge of the work Mr. Boudreux was doing. He was a diver. I had known Mr. Boudreux about two years. As to what he had been doing prior to this time, Mr. Boudreux used to work for the International Shipbuilding Company as a diver, and on several occasions when we needed an extra diver he was working for the National Shipbuilding Company as a relief man. As to whether I had seen him prior to this time during the prior six or eight months, I don't remember just how long it was, but we never used but the one diver up to this particular time when we needed another. Mr. Boudreux was in the service of the government and had not been back very long when the Company hired him to do this particular work. I do not know what he was doing for the preceding six or eight months before he did this diving. As to the nature of the work he was doing, it was a set of ways that was formerly used for launching ships and the National Shipbuilding Company decided to do away with that set of ways, or part of it, a hundred feet of it, in order to extend the wharf, and we were dismantling and cutting out those ways. There was no boat on those ways, the last one had been launched on that set of ways. We were dismantling them in order to extend the wharf so [fol. 144] as to dismantle some boats the National Shipbuilding Company had bought. Yes, sir, we were taking those out to get the boats in. Yes, sir, that was an obstruction to navigation, and we were taking the obstruction away. No, sir, I was not present when Mr. Boudreux went down. As to whether he had gone down that day before this time, yes, sir, he went down before noon. He went down something between 11 and 12 o'clock. The purpose of going down was to get familiar with his work and see the condition of it, what his work was. I had given him an outline of the work with the blue print, but he wanted to get familiar himself with it, and try the pressure of the air. He hadn't worked under any pressure for some time before, and he wanted to see how he would stand it. Yes, sir, he wanted to try it out, and get familiar with the work. Mr. Boudreux did not make any statement to me as to why he was going down there

at that time and state his reasons for going down, other than what I have said. The place he was working from was a barge, with a house on it, and a pump set in the middle. It was a barge about 12 feet wide and possibly 18 feet long, with about an 8 x 10 cabin on it. That barge was about 35 feet from shore, out in the Sabine River, and he went down from the barge into the river. There was a ladder attached from the barge down into the water so he could go back and forth, climb up and down. This ladder did not go to where his work was, just five or six feet in the water, enough for him to submerge."

The record does not disclose in detail the character of the business of the National Shipbuilding Company. The deceased met his death on the first day of his employment as a diver. The terms of his contract with the National Shipbuilding Company, its duration and the character of the work to be performed by him are not shown by the record, other than as disclosed in the testimony above.

[fol. 145] In *Home Life & Accident Company v. Wade*, 236 S. W. 778, we recently applied the rule announced by the Supreme Court of the United States in the *Jensen* case, 61 Law. Ed., 1086, as we then understood it, and held that the cause of action therein asserted was maritime in its nature, and exclusively cognizable in a court of admiralty. A writ of error was granted against our holding, after being dismissed by the Supreme Court for want of jurisdiction. Hence, it would appear that our holding in that case was most carefully reviewed by our Supreme Court, and after such a review the writ was granted. Since our decision in that case, the Supreme Court of the United States has further discussed the relation of state Workmen's Compensation Acts to the maritime law of the nation in *Western Fuel Co. v. Garcia*, 66 Law. Ed. 97; *Grant-Smith-Porter Ship Company v. Rhode*, 66 Law Ed., 172; and *Industrial Commission v. Nordenholt Company*, 66 Law. Ed., 567. We did not have these cases before us at the time we filed our opinion in the *Wade* case. As we now understand the questions involved in appellant's proposition, we do not think the *Wade* case was correctly decided, especially so in view of the fact that a writ was granted against our holding.

Recently, in an opinion by the Chief Justice of this Court, in *Lumbermen's Reciprocal Association v. Adecock*, opinion not yet reported, we held that the Workmen's Compensation Act of this state covered injuries received while one, engaged in work on navigable waters, working from a small boat, was injured in his efforts to take sunken logs out of the water.

The burden rested on appellant to show that appellees' cause of action was maritime in its nature. We do not believe this burden was met by a simple showing that the deceased met his death under the circumstances related in the testimony of the witnesses as above given.

Appellant raises for the first time in this court, by supplemental [fol. 146] brief filed herein on the 15th day of November, 1922, the following assignments of fundamental error:

"The Court erred in rendering judgment against the defendant because the plaintiff's petition did not alleged that the National Shipbuilding Company, the employer of the deceased, was a subscriber under the Workmen's Compensation Act of Texas, nor that defendant was the insurer of the National Shipbuilding Company under the Workmen's Compensation Act, at the time of his death, and the pleadings are insufficient to support the judgment."

As against this assignment, appellees' petition should be construed in the light of all reasonable intemds arising from its allegations. Appellees allege that at the time of the death of O. O. Boudreaux he

"was duly and regularly employed by the National Shipbuilding Company, and that on and prior to the date of his death and on the date of the injury sustained by him the relation of employee and employer duly and regularly existed between the National Shipbuilding Company and the said O. O. Boudreaux. * * *

"These plaintiffs present that within the period of 30 days after the death of the said O. O. Boudreaux while in the employment of the National Shipbuilding Company, as aforesaid, that notice of his said death while so employed was given to and had by his said employer and to the Industrial Accident Board and to the Millers' Indemnity Underwriters, the insurer in this cause, and that within six months after the death of the said O. O. Boudreaux these plaintiffs and each of them made claim for Compensation to the said Industrial Accident Board and to the said Millers' Indemnity Underwriters, insurers and defendants herein, as provided by law and are now bringing this suit to set the award and ruling of the Industrial Accident Board made in this cause aside and recover the compensation to which they shall show themselves entitled herein. Plaintiffs gave notice of the death of O. O. Boudreaux within 30 days after his death to defendant and the Industrial Accident Board; that they presented their claim on account of his death within six months after his death to the defendant and the Industrial Accident Board; that the Industrial Accident Board made its award, and that within 20 days thereafter plaintiffs gave notice of their intention not to be bound by the same to the defendant and the Industrial Accident Board and that within 20 days thereafter plaintiff filed this suit to recover against the defendant.

"These plaintiffs further present that the said O. O. Boudreaux was employed by the said National Shipbuilding Company, as a diver at Orange, Texas, and that on the date of his decease, that he was sent below by his said employer to perform his task as a diver, and these plaintiffs believe and have good reason to believe that while under the water that the supply of air furnished the said O. O. Boudreaux became fouled, or that he was furnished an insufficient supply of air, or that in some manner the supply of air was cut off for the time being, so that the said O. O. Boudreaux died from suffocation.

"Wherefore, the premises considered, plaintiffs and each of them

pray the court that the Miller's Indemnity Underwriters, insurers, and that citation issue to them as required by law, and that on trial hereof, that these plaintiffs recover the amount of compensation to which they shall be entitled as against said Millers' Indemnity Underwriters; for the costs of suit, and that the said decree and judgment of the Industrial Accident Board made in this cause on the 7th day of December, 1920, be set aside, and in the alternate they recover the cost of burial, \$500.00, for such other and further re-[fol. 148] lief, of a nature either legal or equitable, special or general in law or in equity, as to which they and each of them shall show themselves entitled and of this, the plaintiffs will in duty bound respectfully ever pray."

There is no specific allegation that the National Shipbuilding Company was a "subscriber" under the Workmen's Compensation Act, nor, except as given above, any specific allegation that appellant was the insurer of the National Shipbuilding Company under the terms of the Workmen's Compensation Act. "A defective statement of a cause of action is not subject to a general demurrer. If it is so stated that it is amendable, it is good against such demurrer." Northwestern National Insurance Company vs. Woodward, 45 S. W. 187; Telegraph Company v. Grimes, 82 Texas, 94. There was an allegation that Boudreux was an employe of the National Shipbuilding Company, and that appellant was the insurer, and on these allegations plaintiffs based their recovery, and prayed for damages. No recovery could have been had except on the theory that the National Shipbuilding Company was a subscriber, and that appellant was the insurer. These allegations did not exclude the inference that the National Shipbuilding Company was a subscriber and carried a policy of insurance with appellant under the terms of the Workmen's Compensation Act. Appellant is described by appellee as "the insurer." What meaning should be given to these allegations? What are the reasonable intensions arising therefrom?

In Northwestern National Life Insurance Company v. Woodward, supra, the plaintiff sought recovery under a policy of fire insurance, covering a certain house which was destroyed by fire within the terms of the policy. Discussing the proposition now before us, Judge Neill said:

"Plaintiffs' petition, as stated, does not specifically aver an insurable [fol. 149] interest at the time of the loss, but it contains this averment: 'Which said loss or damage did not occur directly or indirectly under circumstances which by the terms and conditions of said policy, or any of them, would absolve the defendant from liability therefor; but, on the contrary, said loss or damage did occur under circumstances and in a manner which would and did render defendant liable therefor.' The appellant would not have been liable to appellees unless they had an insurable interest at the time of the loss, and the allegation that the loss happened under circumstances which rendered defendant liable therefor cannot be true, as admitted

by the general demurrer, unless the insurable interest continued and was in existence at the time of the loss. It is thus seen that the fact that appellees owned an insurable interest in the property at the time of the disaster is clearly inferable from the other facts alleged in the petition is assailed by a general demurrer, must be taken as an alleged fact."

In *Gulf Production Company v. Bonin*, 242 S. W. 776, an opinion by this court, we said, in discussing a petition which failed to contain a specific allegation that a servant was a vice principal:

"If every reasonable intendment is indulged in favor of appellee's petition, we believe that the issue of vice principal was duly pleaded. He alleged 'that the injuries to and death of said minor child, Porter Bonin, were proximately caused by the negligence of the defendant, by and through its agent and employee aforesaid,' and, referring to the specific acts of negligence pleaded by appellee, 'that the defendant was guilty of negligence attributable to it in each and all of the particulars aforesaid.' Some effect must be given to these allegations. Appellee was trying to state a cause of action. He alleged that the death of Porter Bonin was caused by the negli- [fol. 150] gence of appellant. He alleged that the acts of Habermacher were attributable to appellant. That could be true only if Habermacher was a vice principal. No special exceptions were urged against these allegations. Standing unchallenged, we believe they were sufficient to admit evidence of the fact that Habermacher was a vice principal."

Had exceptions been urged, appellee's petition could have been amended by allegations showing more in detail its liability as insurer, but appellant is not entitled to such special exceptions under the assignment of fundamental error. The jurisdiction of the District Court of Orange County to entertain this case did not rest on the performance of any antecedent duty which was not fully alleged, such as presenting the claim to the Industrial Accident Board, disposition by the Board of the claim, notice of appeal, etc. In our judgment, the two cases just cited are conclusive against appellant's assignment.

We cannot sustain appellant's proposition that there is no evidence in the record that it had issued a policy to the National Shipbuilding Company under the terms of the Workmen's Compensation Act. There is no specific evidence on this point, that is to say, no witness testified directly that such a policy had been issued, but we believe the issue was raised by the evidence. After the death of O. O. Boudreault, a claim under the Workmen's Compensation Act was filed with the Industrial Accident Board. Thereupon, the Board wrote appellant the following letter:

"April 30th, 1920.

"In re O. O. Boudreux vs. National Shipbuilding Co.

"Millers Indemnity Underwriters, Dallas, Texas,

"GENTLEMEN: Notice has been received in this Department from [fol. 151] the National Ship Building Company of Texas to the effect that a fatal injury was sustained to O. O. Boudreux, whose address is given as Lafourche, La., on April 17th, 1920. We presume that similar notice has been sent to you.

As soon as you have made your investigation in this case, we would appreciate it if you would advise the Board your attitude with reference to the payment of compensation.

Your usual prompt attention to the matter will be greatly appreciated.

Yours very truly, Industrial Accident Board, by — — —,
Secretary." E:L.

Appellant replied to the letter of the Industrial Accident Board as follows:

"Millers Indemnity Underwriters, Dallas, Texas

SB 4648.

May 4, 1920.

Industrial Accident Board, Austin, Texas.

GENTLEMEN:

In re Your No. F-3777, O. O. Boudreux, Deceased, vs. National
Shipbuilding Company

"We have the Secretary's letter of April 30th advising that notice of fatal injury had been received by the Board in case above styled. So far we have not received any notice of fatal injury or claim for compensation and will have to ask that the Board advise us of the name and address of the person filing the notice with the Board, together with the relationship of such person to the deceased before we can state what our position will be with regard to the payment of compensation.

[fol. 152] "We received a report of accident from the National Ship Building Company and have investigated the case. However, in the absence of any claim for compensation we do not think it would be proper for us to state our position with regard to payment of compensation.

Yours truly, (Signed) Bailey & Collins, Managers." HBI-e.

These letters clearly show that the Board referred this claim to appellant as the insurer; that the National Shipbuilding Company had made a report of the accident to the appellant and appellant, after having investigated the claim, made no denial that it was the

insurer. In fact, as we construe these letters, they raise the issue that appellant was the insurer. Except on that theory, why should the National Shipbuilding Company have made to it a report of the accident? The matter having been referred to it as the insurer, and the claim having been investigated by it, why did it not deny such relation? Of course, if the issue was raised that appellant had issued a policy of insurance under the Workmen's Compensation Act for the benefit of the National Shipbuilding Company, the issue was also raised that the National Shipbuilding Company was a "subscriber" within the terms of that Act. Appellant admits that it had received notice of the accident from the National Shipbuilding Company. From the evidence offered, it clearly appears that the National Shipbuilding Company was qualified to be a subscriber under the terms of the Workmen's Compensation Act. Hence, we overrule both these propositions.

We understand that appellant has waived its assignment raising the point that appellees failed to give the proper notice of appeal. However, there is nothing in that contention. The Board made its award on the 7th day of December, 1920. Appellees filed their [fol. 153] original petition in this cause on the 10th day of December, 1920. Appellant filed its original answer on the 26th day of December, 1920. By answering appellees' petition within the twenty days allowed them by law in which to give notice to it of their appeal from the award of the Industrial Accident Board, appellant waived all defenses, both as to the manner of service of the notice and as to its sufficiency. Georgia Casualty Co. v. McClure, 239 S. W. 644.

The judgment of the trial court awarding appellees the maximum compensation of \$15.00 per week is fully sustained by the evidence. The evidence is without dispute that at Orange, where deceased met his death, the average monthly wages of divers was from \$300 up, and that such wages had not been less than this sum within the preceding twelve months. The deceased was employed at a salary of \$300 per month and, as we have already seen, was killed on the first day of his employment. The evidence shows that he had not worked for some weeks, possibly months, prior to the day of his death. But the facts we have given bring this case clearly within Section 1, part IV of the Workmen's Compensation Act, which is as follows:

"If the injured employee shall not have worked in such employment during substantially the whole of the year, his average annual wages shall consist of three hundred times the average daily wage or salary which an employee of the same class working substantially the whole of such immediately preceding year in the same or in a similar employment in the same or in a neighboring place, shall have earned in such employment during the days when so employed."

The judgment of the court contains the following conclusion:

"All other facts necessary to plaintiff's recovery being admitted and undisputed."

[fol. 154] While appellant complains of this conclusion and makes it the basis of its seventeenth proposition, yet it fails to call to our attention any fact found by the court under this conclusion or any fact not expressly found which would have to be inferred or found by us and would rest for its support on this conclusion. Hence, it does not appear that appellant has suffered any injury because of the matters complained of.

No reversible error was committed by the court in admitting in evidence the report made by the National Shipbuilding Company to the Industrial Accident Board, to the effect that the average monthly wages of deceased was \$300.00. The evidence on this issue was without dispute, and the report showed nothing which was not already before the jury.

The court did not err in admitting in evidence the letters above quoted, from the Industrial Accident Board to appellant and from appellant to the Board, as against the objections that they were "highly prejudicial to appellant and of such nature as to cause, and probably did cause, the jury to render an improper verdict against appellant on controlling issues of fact." Appellant did not deny receiving the letter from the Board, nor the writing of the letter to the Board. We see nothing objectionable in either of these letters.

The testimony of E. J. Boudreaux as to the appearance of the deceased about a day after his death was admissible. Its weight was a question to be determined by the jury. As to the physical appearance of deceased immediately after his death, Fernet Darnees testified:

"Well, I see him dead; that is all I see. I see his face is in a bad shape. * * * That is all, I see him dead. The place where I first saw him dead was on that barge. Yes, I saw the body on the barge. That was about ten minutes before four o'clock. It was on [fol. 155] Saturday, it was in the month of April, 1920, and on a Saturday, and about twenty or ten minutes before four. And Mr. Boudreaux was dead when I saw him. Yes, I saw his body lying on the barge, and the barge was in the river, this river here at Orange, the Sabine River. * * * As to how he looked, how his face looked, he got bad face. That is all I know; I see his bad face, and his arms looked tight. He has got bad eyes, bulged out. The color of his face was blue black. As to whether his face was its regular size or swelled out, it no swell out, just a little bit in the neck."

L. J. Kerr testified:

"I would judge that there was about four inches of water in that diving suit; yes, sir, inside the suit, about the bottom of the feet. As to whether when we brought this man to the surface after he was dead, and exposed him, took the diving suit off him, whether

his eyes were bulged, popped a little, will say, yes; as soon as I saw him I knew he was dead. I saw the condition that he was in, and I knew if I didn't get the helmet off him, his face was going to be so swollen that I couldn't get it off him without cutting it off. He was swollen all over his neck and face, and he had had a hemorrhage from his nose. His eyes were bulged a little, too. He had a hemorrhage from his nose, but I wouldn't say positively about the ears. I do remember the hemorrhage from his nose. His face was a bluish cast. As to whether it was reddish bluish black case, it wasn't black; it was reddish. Yes, it was livid. And his lips were swollen, too. I didn't see whether his tongue was thick. His face was distorted. As to whether he seem tense, like when you tense your muscles, no, if he had been anything like that, we couldn't have gotten the suit off without cutting it. Yes, sir, I do remember his face was of a dark, red, livid appearance; his face was all out of shape; horrible condition. As to whether he looked like he had suffered agonies before his death, I wouldn't know whether he suffered any agonies, or just went off without it.

Q. Would his face impress you as a man who had suffered agony before his death?

A. I couldn't tell you, because I don't know the agonies of a man when he is suffering; I couldn't answer that, because I am not in a position. But I do say that his face was swollen and out of shape and horrible looking. As to whether this hemorrhage was a considerable hemorrhage, well it is pretty hard to tell; when I saw him there was blood on each side of his nostrils, and in that water in his suit, that about 4 inches of water, there was a reddish cast, which showed there was blood in that. Yes, the water in the suit was tinged with blood. His lips were as large again as they should be."

Dr. W. T. Williams testified:

"My name is Dr. W. T. Williams. I live at Beaumont. I heard the testimony of Mr. Kerr, and heard his describe the appearance of the man Boudreux when he was drawn up there and his suit was opened up, the appearance of his face, and all that. From the description that Mr. Kerr gave of Mr. Boudreux, his appearance, and everything, swollen condition, livid expression, distorted features, I can say in my opinion as a medical man what caused his death. I have had about 27 years in the practice of medicine. This man died from suffocation, by which I mean lack of air. I say that because it presents absolutely a typical picture of a man who had died from suffocation, lack of air, the discoloration, the bulging eyes, swelling features, distortion of the face, shows evidently he was using the muscles of his lungs and face, and all the upper body for the purpose of drawing in air into his lungs. Yes, my opinion is he died of suffocation. I never saw Mr. Boudreux in my life. I don't know anything about this case. I am basing my opinion entirely on the statement that that gentleman over there made."

In our judgment, this testimony was sufficient to sustain the verdict of the jury as to the manner and cause of the death of O. O. Boudreaux. There was no error committed by the court in receiving the testimony of Dr. Williams. This testimony comes within the well recognized rules for the reception of expert evidence.

Over appellant's objection, the court permitted Nick Kahl to testify that when a man dies underneath the water in a diving suit, generally the cause of his death is insufficient air. If this was improper testimony, we do not believe its reception should reverse this case, because, in our judgment, the overwhelming weight and preponderance of the evidence is to the effect that the deceased met his death by suffocation, and not by reason of heart failure, as appellant contends.

What we have said disposes of all propositions raised by appellant, and finding no error in the record, the judgment of the trial court is in all things affirmed.

Daniel Walker, Associate Justice.

[Title omitted]

[File endorsement omitted.]

[fol. 158]

IN COURT OF CIVIL APPEALS

[Title omitted]

**MOTION FOR REHEARING AND ORDER OVERRULING
SAME—Filed Dec. 9, 1922**

Now comes the appellant in the above entitled and numbered cause, and presents this, its Motion for Rehearing, herein, and for cause of said motion respectfully presents the following grounds, to-wit:

First Ground

The Court of Civil Appeals erred in refusing to sustain the Appellant's First Proposition in its brief and assignments related thereto, said proposition being as follows:

"It appearing from the undisputed evidence that the deceased, O. O. Boudreaux, at the time of his death was engaged in submarine diving in the waters of a public navigable stream, attempting to clear the waters of said stream of an obstruction to navigation beneath the waters of said stream, and working from and attached to a barge floating upon the waters of said stream about thirty-five feet from shore, and that he was working from and attached to said [fol 159] barge by a life line and air hose being his only connection with the outside world, the cause of action for his death while so engaged is of an admiralty and maritime nature, and exclusively

cognizable in a Court of Admiralty by virtue of Article 3, Section 2, of the Constitution of the United States. (Germane to assignments Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 and 22.)"

Second Ground

The Court of Civil Appeals erred in refusing to sustain the Appellant's Second Proposition in its brief and assignments related thereto, said proposition being as follows:

"It appearing from the undisputed evidence that this cause was of an admiralty and maritime nature, the action of the District Court of Orange County, Texas, in entering judgment against appellant under the Workmen's Compensation Law of Texas, was an erroneous exercise of authority under a Statute of the State of Texas, in violation of Article 3, Section 2 of the Constitution of the United States, which Article and Section place the jurisdiction of Admiralty and maritime cases exclusively in the Courts of the United States. (Germane to assignments Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 and 22.)"

Third Ground

The Court of Civil Appeals erred in refusing to sustain the Appellant's Third Proposition in its brief and assignments related thereto, said proposition being as follows:

"It appearing from the undisputed evidence that this cause was of an admiralty and maritime nature, the action of the Court in entering judgment against appellant was an erroneous holding that appellee had a right of action under the Workmen's Compensation Law of Texas against appellant in addition to the remedies given appell[fol. 160] lees by admiralty jurisdiction, and was an exercise of an authority under said Workmen's Compensation Law of Texas in violation of the Fourteenth Amendment to the Constitution of the United States, in that it denies to appellant the equal protection of the law, because said compensation law does not afford an exclusively remedy, but leaves the employer and his property subject to a suit in admiralty, and the insurer under the compensation law of Texas liable to pay such judgment, subjecting it to double damages. (Germane to assignments Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 and 22.)"

Fourth Ground

The Court of Civil Appeals erred in refusing to sustain the Appellant's Fourth Proposition in its brief and assignments related thereto, said proposition being as follows:

"The Workmen's Compensation Law of Texas is invalid under the Constitution of the United States in so far as it applies to admiralty and maritime causes, and the undisputed evidence showing this to be a cause of admiralty and maritime nature, this cause should have been dismissed for want of jurisdiction. (Germane to assignments Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 and 22.)"

Fifth Ground

The Court of Civil Appeals erred in refusing to sustain the Appellant's Fifth Proposition in its brief and assignments related thereto, said proposition being as follows:

"It appearing from the undisputed evidence that this is a cause of an admiralty and maritime nature, the action of the Court in rendering judgment against appellant under the Workmen's Compensation Law of Texas, is in violation of the Fourteenth Amendment to the Constitution of the United States because it deprives the appellant of its property without due process of law. (Germane to assignments Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 and 22.)"

Sixth Ground

The Court of Civil Appeals erred in refusing to sustain the Appellant's Sixth Proposition in its brief and assignments related thereto, said proposition being as follows:

"It appearing that the deceased was engaged in clearing a public navigable stream of an obstruction to commerce, the action of the Court in entering judgment against the appellant was a holding that the Workmen's Compensation Law of Texas applies to interstate Commerce, and therefore being an exercise of an authority under said Workmen's Compensation Law in violation of Article 1, Section 8 of the Constitution of the United States in that it constitutes a regulation of and burden upon commerce among the several states. (Germane to assignments Nos. 9, 10, and 22.)"

Brief of the Argument

Argument under Grounds 1 to 6, Inclusive

We submit that the Court is in error in holding that the Court below had jurisdiction of this case. Regardless of whether or not the provisions of the Compensation Law had been invoked, the facts very plainly established that this is a cause exclusively cognizable in a Court of Admiralty, and that the District Court of Orange County, Texas, had no jurisdiction thereof at any event. The Court has taken judicial knowledge of the fact that the Sabine River, upon the waters of which this death occurred, is not within the boundaries of the State of Texas, but that it forms the boundary line between the States of Louisiana and Texas. It is undisputed that this is a [fol. 162] navigable stream, and it is undisputed that the death occurred upon the waters of this stream. This being an action of tort, the place where the tort was committed fixes the jurisdiction. As said in the very recent case of *Grant-Smith-Port Ship Co. vs. Herman F. Rhode*, U. S. Supreme Court decision, (February Advance Sheet), "The general doctrine that in contract matters, admiralty jurisdiction depends upon the nature of the transaction, and in tort matters upon the locality, has been so frequently asserted by this Court that it must now be treated as settled." The Supreme

Court cites many cases in support of the doctrine announced. We consider this purely an action of tort, and the nature of the contract is immaterial, since the tort happened upon navigable waters. However, the contract of employment, as well as the nature of the work, was maritime. Mr. Boudreux was employed as a marine diver. He was working from a floating barge, and his work was to remove an obstruction to commerce from the bed of the Sabine River. In this case, the employment or contract is maritime in its nature and the rights and liabilities of the parties is prescribed by general rules of maritime law essential to its proper harmony and uniformity. See Southern Pac. Ry. Co. vs. Jensen, 244 U. S. 205, 51 L. Ed. 1086, L. R. A. 1918, C. 451, 14 N. C. C. A. 596, Chelentix vs. Luckenback, S. S. Co. 247 U. S. 372, 62 L. Ed. 1191, 19 N. C. C. A. 309, Union Fish Co. vs. Erickson, 248 U. S. 308, 63 L. Ed. 261, Knickerbocker Ice Co. vs. Stewart, 253 U. S. 149, 64 L. Ed. 831.

That the boat upon which he was working, or rather from which he was working, is a vessel within admiralty, we cite the cases of *In re P. Sanford Ross*, 196 Fed. 921, *Charles Barnes vs. One Dredge Boat* 169 Fed. 895, L. 897, *Bowers Hydraulic Dredging Company vs. Federal Contracting Company* 148 Fed. 290.

The work on a pile driver has been held to be maritime work in the case of *Lawrence vs. Flatboat*, 84 Fed. 200. The fact that Boudreux [fol. 163] went below to work upon piling under the water, driven into the bed of the river, does not keep it from being a maritime tort. See *The Blackheath* 195 U. S. 351, 49 L. Ed. 236. In 1 C. J. 1287, it is said:

"Where the consummation of the injury happens upon navigable water, the case is one within the admiralty jurisdiction, and it is immaterial that it originated on land. And the rule applies where the injury is done by the land itself or property attached to the land; thus, admiralty has jurisdiction over an injury to a vessel on navigable water caused by a defective pier or wharf, or by a bridge or draw."

Now, if we take the theory of the case that Boudreux's death was caused from the pumps not giving sufficient air, then, the ways attached to the bottom of the river had nothing to do with it. In view of the jury's verdict, it seems that this theory is the only tenable one, for no entanglements were discovered in the air line leading to Boudreux's body. If that is the case, the cause of the death originated and culminated upon the vessel, and is purely maritime in its nature. But if the theory that Boudreux's air line became entangled in the timbers is adopted, the cause of the death is none the less maritime. Every species of tort, however occurring, and whether on board a vessel or not, if upon the high seas, or navigable waters, is of admiralty cognizance. *The Plymouth* 3 Wall. 20, 36, 18 L. Ed. 125; *Proctor vs. Dillon* 235 Mass. 541.

Three cases have been decided recently by the Supreme Court of the United States, that is, *Industrial Commission vs. Nordenholz*, 66 L. Ed. 557; *Western Fuel Co. vs. Garcia*, 66 L. Ed. 97; and the

Grant-Smith-Port Ship Co. vs. Rhode, 66 L. Ed. 172, and in the Nordenholz case, Justice McReynolds reiterates the doctrine announced in the Jensen case, and we most earnestly submit that that doctrine applies to this case.

[fol. 164] In our assignments and propositions we have endeavored to raise all the objections that were leveled at the judgment of the Court in the case of Southern Pacific vs. Jensen, 244 U. S. 205, 16 L. Ed. 1086, and in the case of Home Life and Accident Company vs. Wade, recently decided by this Honorable Court, and we submit that this cause should be disposed of in the same manner, reversed and rendered.

Conclusion

Appellant prays that this Motion for Rehearing be considered by the Court and that the order heretofore entered affirming the judgment of the Court below be set aside and this cause be reversed and rendered, and if mistaken in the relief so prayed for, that this cause be reversed and remanded.

Appellees are represented by the firm of Howth & O'Fiel, and Lamar Hart, who reside in Beaumont, Texas, and upon whom service of this motion may be had.

Respectfully submitted, Morris & Barnes, Attorneys for Appellant.

[File endorsement omitted.]

[fol. 165] Order, Made December 20, 1922, Overruling Motion for a Rehearing

Motion No. 1342. Cause No. 874. Millers Indemnity Underwriters vs. E. J. Boudreaux et al. From Orange. Motion for a rehearing. The motion is overruled.

[File endorsement omitted.]

IN SUPREME COURT OF TEXAS

MILLERS INDEMNITY UNDERWRITERS, Plaintiff in Error,
vs.

E. J. BOUDREAUX et al., Defendants in Error

Appealed from the District Court of Orange County, Texas

PETITION FOR WRIT OF ERROR—Filed Jan. 19, 1923

To the honorable Supreme Court of Texas:

Your petitioner, Millers Indemnity Underwriters respectfully applies for a Writ of Error to the Honorable Court of Civil Appeals

for the Ninth Supreme Judicial District, at Beaumont, which Court has in this case, as your petitioner perceives, committed errors of [fol. 166] law of such importance to the jurisprudence of this State as to require correction by this Court. The questions arising are not only important to the jurisprudence of the State, as such, but also involve questions of law material to the decision of this cause upon which the Court of Civil Appeals at Beaumont has, in express words, overruled its own decision and opinion recently rendered by it involving the same issues, and the decision of the Court of Civil Appeals in this case is not only in conflict with its own previous decision, but also is an erroneous construction of Art. 3, Sec. 2, Art. 1, Sec. 8, and the Fourteenth Amendment to the Constitution of the United States, and is in conflict with the decisions of the Supreme Court of the United States. The decision of this cause also involves the construction of a Statute of Texas; to wit, the Texas Employer's Liability Act, the question being whether or not said act applies to causes of an admiralty and maritime nature, which are exclusively cognizable in a Court of Admiralty by virtue of Article 3, Section 2, of the Constitution of the United States, and whether or not said Statute is in violation of said article and section of the Constitution of the United States as applied to causes of an admiralty and maritime nature. The decision of this cause also involves the question of whether or not it is necessary for the claimant to allege and prove that the employer of the injured person was qualified to become and was a subscriber under the compensation law, as well as that the insurance company being sued had issued a policy of compensation insurance to the employer under the Texas Workmen's Compensation Law, the decision of the Court of Civil Appeals at Beaumont being in conflict with decisions of other Courts of Civil Appeals as [fol. 167] well as decisions of the Supreme Court of Texas on these questions.

Brief Statement of the Case and Grounds of Jurisdiction

This suit was instituted on December 10, 1920, by E. J. Boudreux, R. J. Boudreux, Mary M. Boudreux and Mrs. E. J. Braud, joined pro forma by her husband, E. J. Braud, and by an amended petition filed on the day of the trial, to-wit, January 30, 1922, and upon which the cause went to trial, said plaintiffs alleged substantially that they are the surviving brothers and sisters of O. O. Boudreux, deceased, who was employed as a diver by the National Shipbuilding Company, at Orange, Texas, that 60% of the average weekly wage of the said O. O. Boudreux amounted to more than \$15.00 per week; and that they were dependent upon the wages of the said O. O. Boudreux for support; that on the 17th day of April, 1920, said O. O. Boudreux was sent below by his employer to perform his task as a diver, and upon belief, they allege that while under the water the supply of air furnished the said Boudreux became fouled, or that he was furnished an insufficient supply of air, or that in some manner the supply of air was cut off for the time being, so that the said O. O. Boudreux died from suffocation; that

notice of his death and claim for compensation therefor were given to his employer, the Industrial Accident Board and Millers Indemnity Underwriters, within the time provided by law, and that on the 7th day of December, 1920, the Industrial Accident Board made an award from which the said surviving brothers and sisters desired to appeal, and that within twenty days after said award was made, notice was given to the Industrial Accident Board and to Millers Indemnity Underwriters that suit would be filed within the time required by law to set aside said award, and that this suit was so filed, the award being attached as Exhibit A to their said petition. [fol. 168] Plaintiffs prayed that said award be set aside, for compensation on account of the death of O. O. Boudreaux, and in the alternative for burial expenses of \$500.00, for general and special relief, etc.

To this petition on the said date, the defendant, plaintiff in error here, filed its amended answer, containing: A plea to the jurisdiction of the Court, on the ground that the death occurred on the waters of a navigable stream, the Sabine River, while the deceased was engaged as a diver in a maritime employment of removing an obstruction to commerce from beneath the waters of said river, a general demurrer, general denial, etc.

At the conclusion of the evidence, to-wit, January 31, 1922, Defendants in Error dismissed their suit as to all plaintiffs except Mrs. E. J. Braud and husband, and Plaintiff in Error then presented its motion to the Court to dismiss this cause for want of jurisdiction, on the ground that the cause is exclusively cognizable in a Court of Admiralty, which was by the Court overruled, and to which Plaintiff in Error excepted. The Plaintiff in Error then requested a peremptory instruction to the jury in its favor, which was refused, on February 1, 1922. Over the objection of plaintiff in error the Court then submitted the case to the jury. The charge was upon special issues supplemented by special requested instructions, given at the request of plaintiff in error, and the issues found by the jury were construed by the Court to be favorable to defendant in error and upon motion of defendant in error judgment thereon was entered in their favor on April 22, 1920, for the sum of \$5,400.00, declaring a part of said sum due, etc.

On the 3rd day of February, 1922, plaintiff in error filed its motion [fol. 169] for a new trial, containing its assignments of error, and said motion was by the Court overruled on the same day, to which ruling the plaintiff in error in open Court duly excepted, and the Court gave plaintiff in error sixty days in addition to the time allowed by law to have prepared and filed its bills of exception, transcript and Statement of Facts.

Plaintiff in error did and performed all things necessary to perfect its appeal to the Court of Civil Appeals at Beaumont, which Court affirmed the judgment of the lower Court, and overruled plaintiff in error's motion for a rehearing which was seasonably filed, all questions raised in this petition for a Writ of Error were duly assigned and briefed in Plaintiff's in Error motion for a new trial in the trial

Court, and in its brief and motion for rehearing in the Court of Civil Appeals at Beaumont.

This is a case in which the jurisdiction of the Court of Civil Appeals is not final, and the Supreme Court has jurisdiction, because errors of law have been committed by the Court of Civil Appeals at Beaumont of such importance to the jurisprudence of the State as to require correction. The errors of law committed by the Court of Civil Appeals will be treated in three divisions as follows:

First Ground

In this case the Honorable Court of Civil Appeals has held that the Compensation Law of Texas applies to a cause of action for the death of a diver working in a diving suit, suspended from a barge thirty-five feet from shore, underneath the waters of a public, navigable stream, the Sabine River at Orange, Texas, while engaged in clearing said river of an obstruction to navigation and commerce.

[fol. 170] On this holding the judgment of the Court of Civil Appeals is in conflict with its own opinion in the case of Home Life and Accident Company vs. Wade 236 S. W. 778, the Court saying in its opinion in this case "as we now understand the questions involved in appellant's proposition, we do not think the Wade case was correctly decided," thereby directly overruling its own decision in which a writ of error was dismissed for want of jurisdiction by the Supreme Court, but afterwards granted, but the case was settled before a decision was rendered by the Supreme Court, and the case dismissed. On this holding the judgment of the Court of Civil Appeals is also in conflict with many decisions of the Supreme Court of the United States among which are the following cases: Southern Pacific vs. Jansen 244 U. S. 205; 37 Sup. Ct. 524; 67 L. Ed. 1086; L. R. A. 1918 C. 451; Ann. Cas. 1917 E. 900; Knickerbocker Ice Co. vs. Stewart, 253 U. S. 149, 40 Supt. Ct. 438, 64 L. Ed. 834, 11 A. L. R. 1145; Peters vs. Veasey 251 U. S. 121, 40 Sup. Ct. 65, 64 L. Ed. 180.

The holding of the Court of Civil Appeals in this case is wrong for the following additional reasons:

1. The action of the Court in entering judgment against plaintiff in error was an erroneous holding that appellee had a right of action under the Workmen's Compensation Law of Texas against plaintiff in error in addition to the remedies given defendants in error by admiralty jurisdiction, and was an exercise of an authority under said Workmen's Compensation Law of Texas in violation of the Fourteenth Amendment to the Constitution of the United States, in that it denies to plaintiff in error the equal protection of the law, because said compensation law does not afford an exclusive remedy, but leaves the employer and his property subject to a suit in admiralty, and the in-[fol. 171] surer under the compensation law of Texas liable to pay such judgment, subjecting it to double damages.

2. The Workmen's Compensation Law of Texas is invalid under the Constitution of the United States in so far as it applies to ad-

miralty and Maritime causes, and this cause being of an admiralty nature, it should have been dismissed for want of jurisdiction.

3. This cause being of an admiralty and maritime nature, the action of the Court in rendering judgment against plaintiff in error under the Workmen's Compensation Law of Texas, is in violation of the Fourteenth Amendment to the Constitution of the United States, because it deprives the plaintiff in error of its property without due process of law.

4. It appearing that the deceased was engaged in clearing a public navigable stream of an obstruction to commerce, the action of the Court in entering judgment against plaintiff in error was a holding that the Workmen's Compensation Law of Texas applies to interstate commerce, and, therefore, being an exercise of an authority under said Workmen's Compensation Law in violation of Article 1, Section 8 of the Constitution of the United States, in that it constitutes a regulation of and burden upon commerce among the several States.

Statement

F

The question decided by the Honorable Court of Civil Appeals was involved in the case and in the decision of the Court of Civil Appeals therein, in connection with the presentation by the appellant, plaintiff in error herein, of its plea to the jurisdiction of the trial court, its motion to dismiss the cause in the trial court for want or jurisdiction, [fol. 172] and its claim that the trial court should have given a peremptory instruction in its favor. The point was presented by the appellant, plaintiff in error here, both in its motion for a new trial in the Court below, and in its brief and motion for a rehearing in the Court of Civil Appeals.

IN SUPREME COURT OF TEXAS

ASSIGNMENTS OF ERROR

(Submitted as Propositions)

First

The Court of Civil Appeals erred in refusing to sustain the Appellant's First Proposition in its brief and assignments related thereto, said proposition being as follows:

"It appearing from the undisputed evidence that the deceased, O. Boudreux, at the time of his death was engaged in submarine diving in the waters of a public navigable stream, attempting to clear the waters of said stream of an obstruction to navigation beneath the waters of said stream, and working from and attached to a barge floating upon the waters of said stream about thirty-five feet from shore, and that he was working from and attached to said barge by a

life line and air hose being his only connection with the outside world, the cause of action for his death while so engaged is of an admiralty and maritime nature, and exclusively cognizable in a court of admiralty by virtue of article 3, Section 2, of the Constitution of the United States. (Germane to assignments Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 and 22.)"

[fol. 173]

Second

The Court of Civil Appeals erred in refusing to sustain the appellant's Second Proposition in its brief and assignments related thereto, said proportion being as follows:

"It appearing from the undisputed evidence that this cause was of an admiralty and maritime nature, the action of the district court of Orange County, Texas, in entering judgment against appellant under the Workmen's Compensation Law of Texas, was an erroneous exercise of authority under a Statute of the State of Texas, in violation of Article 3, Section 2 of the Constitution of the United States, which Article and Section place the jurisdiction of admiralty and maritime cases exclusively in the Courts of the United States. (Germane to Assignments No. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 and 22.)"

Third

The Court of Civil Appeals erred in refusing to sustain the Appellants' Third Proposition in its brief and assignments related thereto, said proposition being as follows:

"It appearing from the undisputed evidence that the cause was of an admiralty and maritime nature, the action of the court in entering judgment against appellant was an erroneous holding that appellee had a right of action under the Workmen's Compensation Law of Texas against appellant in addition to the remedies given appellees by admiralty jurisdiction, and was an exercise of an authority under said Workmen's Compensation Law of Texas in violation of the Fourteenth Amendment to the Constitution of the United States, [fol. 174] in that it denies to appellant the equal protection of the law, because said compensation law does not afford an exclusive remedy, but leaves the employer and his property subject to a suit in admiralty, and the insurer under the compensation law of Texas liable to pay such judgment, subjecting it to double damages. (Germane to assignments Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 and 22.)"

Fourth

The Court of Civil Appeals erred in refusing to sustain the Appellant's Fourth Proposition in its brief and assignments related thereto, said proposition being as follows:

"The Workmen's Compensation Law of Texas is invalid under the Constitution of the United States in so far as it applies to admiralty and maritime causes, and the undisputed evidence showing this

to be a cause of admiralty and maritime nature, this cause should have been dismissed for want of jurisdiction. (Germane to assignments Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 and 22.)"

Fifth.

The Court of Civil Appeals erred in refusing to sustain the Appellant's Fifth Proposition in its brief and assignments related thereto, said proposition being as follows:

"It appearing from the undisputed evidence that this is a cause of an admiralty and maritime nature, the action of the Court in rendering judgment against appellant under the Workmen's Compensation Law of Texas, is in violation of the Fourteenth Amendment to the Constitution of the United States because it deprives the [fol. 175] appellant of its property without due process of law. (Germane to assignments Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 and 22.)"

Sixth

The Court of Civil Appeals erred in refusing to sustain the Appellant's Sixth Proposition in its brief and assignments related thereto, said proposition being as follows:

"It appearing that the deceased was engaged in clearing a public navigable stream of an obstruction to commerce, the action of the Court in entering judgment against the appellant was a holding that the Workmen's Compensation Law of Texas applies to interstate Commerce, and therefore being an exercise of an authority under said Workmen's Compensation Law in violation of Article 1, Section 8 of the Constitution of the United States, in that it constitutes a regulation of and burden upon commerce among the several states. (Germane to assignments Nos. 9, 10 and 22.)"

Brief of the Argument

Argument under Propositions 1 to 5, Inclusive

Statement

We would call the Court's attention to the fact that the undisputed evidence shows that the deceased's contract of employment was of an admiralty nature, the work in which he was engaged was of an admiralty nature, and the place where the injury occurred places the cause within the admiralty jurisdiction.

[fol. 176] We would further call the Court's attention to our contention that it was neither pleaded nor proved that the employer of the deceased was a subscriber under the Compensation Law of Texas, nor that the appellant was its insurer, and by our discussion of the admiralty feature of the case, we do not concede that the Workmen's Compensation Law of Texas could apply to this cause in any event.

Plaintiff's witness, Fernest Denae, states:

"Yes, sir, when I saw Mr. Boudreux he was on the barge in the Sabine River; that barge was floating on the waters of the Sabine River. I have beeen in Orange about four years. As to whether I am acquainted with the Sabine River, or that portion of it which passes through Orange, I don't know what you say. Yes, sir, I know what the Sabine River is. Yes, sir, Mr. Boudreux was working on the Sabine River." (S. F. p. 36.)

Plaintiff's witness, And Arrington, states:

"I guess I have lived here in Orange about twenty years, some-where around there, I guess. Yes, sir, I am pretty well acquainted with the Sabine River at Orange. Yes, sir, it is a navigable stream

"Mr. Howth: We admit that.

"Yes, sir, ocean going vessels come in and out of this river all the time, and the tide comes up this river, past Orange. The place where Boudreux was working was on the Sabine River, and he was working from a barge with pumps and things on it that he was working from. It was floating on the water. As to whether it was [fol. 177] over where he was working, it was near it; wasn't over it. His connection with the outside world came from this barge he was working from. The pump and all equipment except what he had was all on this barge or pontoon. They carried that pontoon about, where they wanted to work. It was a floating barge. It was just a small barge, had a little house on it for him to dress in, dressing room, and pumps and equipment that they had. Just a small boat with a house built on it." (S. F. pp. 43-44.)

Defendant's witness, L. J. Kerr, testified:

"My name is L. J. Kerr, I live in Orange, and have lived here about four years. I was with the National Shipbuilding Company on the 17th day of April, 1920, when Mr. Boudreux died. I was foreman of launching all ships, and tending to the construction of all river work and dismantling the work in the river. I was in charge of the work Mr. Boudreux was doing. He was a diver. I had known Mr. Boudreux about two years. As to what he had been doing prior to this time, Mr. Boudreux used to work for the International Ship-building Company as a diver, and on several occasions when we needed an extra diver he was working for the National Shipbuilding Company as a relief man. As to whether I had seen him prior to this time during the prior six or eight months, I don't remember just how long it was, but we never used but the one diver up to this particular time when we needed another. Mr. Boudreux was in the service [fol. 178] of the Government and had not been back very long when the Company hired him to do this particular work. I do not know what he was doing for the preceding six or eight months before he did this diving. As to the nature of the work he was doing, it was a set of ways that was formerly used for launching ships and the Na-

tional Shipbuilding Company decided to do away with that set of ways, or part of it, a hundred feet of it, in order to extend the wharf, and we were dismantling and cutting out those ways. There was no boat on those ways, the last one had been launched on that set of ways. We were dismantling them in order to extend the wharf so as to dismantle some boats the National Shipbuilding Company had bought. Yes, sir, we were taking those out to get the boats in. Yes, sir, that was an obstruction to navigation, and we were taking the obstruction away. No, sir, I was not present when Mr. Boudreux went down. As to whether he had gone down that day before this time, yes, sir, he went down before noon. He went down something between 11 and 12 o'clock. The purpose of going down was to get familiar with his work and see the conditions of it, what his work was. I had given him an outline of the work with the blue print, but he wanted to get familiar himself with it, and try the pressure of the air. He hadn't worked under any pressure for some time before, and he wanted to see how he could stand it. Yes, sir, he wanted to try it out, and get familiar with the work. Mr. Boudreux did not make any statement to me as to why he was going down there at that time and state his reasons for going down, other than what I [fol. 179] have said. The place he was working from was a barge, with a house on it, and a pump set in the middle. It was a barge about 12 feet wide and possibly 18 feet long, with about an 8 x 10 cabin on it. That barge was about 35 feet from shore, out in the Sabine River, and he went down from that barge into the River. There was a ladder attached from the barge down into the water so he could go back and forth, climb up and down. This ladder did not go to where his work was, just five or six feet in the water, enough for him to submerge. No, sir, when he went down to test out the apparatus, he did not find any defect in it or anything the matter with the equipment. It was working all right. There was no complaint whatever. Then he went down in the afternoon; what time it was I don't know; I wasn't there when he went down, but it was possibly after one, between one and two. As to how long it was after he went down before he was brought up, I don't know when he went down. He was brought up from below something between three and four o'clock, possibly 3:30; that was when it was discovered there was something wrong. He was brought up about four o'clock, about when the men were knocking off, quitting work. I went to the river bank about 3:30, if I remember right, something between three and four o'clock, and I asked the tender has Mr. Boudreux been up that afternoon. He said no; I asked him had he heard from him; he said no, the last time he heard from him was about an hour before, when he gave the signal to hold him where he was. I called the men to bring a skiff so I could get out there, and I got hold of his line [fol. 180] and gave him a signal, and never got any reply to it, and I gave him a distress signal, and got no reply to that. I had seen Mr. Colbert and told him something was wrong, that I couldn't hear from Mr. Boudreux, and he said it was nothing, that he was possibly tangled up, and so I insisted on Colbert going down, which he did, put on the helmet, and a connection with the same line of hose

attached to Mr. Boudreux, and he goes down and stays down not over five minutes at the longest. And he come up and said he was dead. We couldn't pull him up at first. I tried to pull him up, and he was hitched somewhere. Mr. Colbert went down and examined what it was, and there was a timber in the construction which was holding him, and we had pulled him so he come right up under the timber. His instructions to us were to pull him until he got to that timber, and he would pull him over that, which he did, and we pulled him right up. Oh, no, his being over that timber would in no way keep him from signaling. His being over on the other side of that timber would in no way injure his air connection; really it would have held the hose up off of the other obstruction in the bottom. As a rule, the hose will not sink very deep; the air will keep most of them afloat. As to the condition of Mr. Boudreux's diving suit when we brought him up on the barge, his suit was puffed out as if the air was in it, the same as a balloon blown up, and the air was still in the suit. It must have been circulating in the suit, but [fol. 181] I couldn't tell, after we got him ashore, but there was air in the suit. There was about 4 inches of water in the bottom of the suit, at the feet. The glass in the front of the helmet was not broken. The first thing we done when he was brought ashore, and pulled him on the barge was to take the plate glass off, which screws in front of the helmet; that was taken off the first thing, so in case there was any life there, to let him get fresh air. Yes, sir, we screwed that glass off. There was no water in the bell or top part of that suit, only in the bottom of his shoes. A diving suit is made of one piece, including the feet and all, and you get into them from the top, feet first. There isn't any buttons or anything at all on it; it is solid, heavy canvass; around the yoke there is a rubber collar, and holes perforated into it where the breast collars come in, and the helmet goes on and screws and makes it air and water tight. The shoes that he wore were made of solid iron, with big heavy straps to hold them on, possibly weighed thirty-five pounds. When we brought him up there was one of those shoes off. The fact that the shoe was off was not responsible for the water getting in. The shoes didn't have anything to do with water getting in. The iron shoe is used for the purpose of keeping him from coming up head first, or to regulate his weight. If they didn't have the weights he couldn't stay down with the air pressure. He had a belt on him that was loaded all around, [fol. 182] possibly weighed fifty pounds or more. In case of an accident or anything, all they have to do is take that off and get rid of that much weight. There was no obstruction that I know of to prevent his giving any sort of signal he wanted to with this life line. When I went out to the boat there was nothing to prevent him from giving a signal. Yes, sir, divers have a certain code of signals that they use in communicating with the men on the boat. There is only one man he gives signals to; that is the one known as his tender, the man that holds his hose and life line. In case he wants to come up or give any signal, more air, or less air, if he wants to go somewhere, or change position, he has got a signal for that, made by means of those ropes. In case of accident, it is an unusual signal; they couldn't

get mixed up, because he jerks on it so that it will almost pull a man overboard. As to whether they have a signal in case they want more or less air, in case they get too much air, he can get rid of it. The helmet has a safety valve on the helmet to regulate his air to a certain point. He can open that up and get rid of his air if he sees fit. A great many divers use their cuffs, and open the cuff up and let the air out. That is where a great deal of the water gets in. There is a rubber band goes over the cuff, and to get rid of it they open that up." (S. F. pp. 47-51.)

The jury found that Boudreux died from suffocation. (Tr. p. 21.) No defect was found in the equipment, and the diver who went down to Boudreux found no entanglements of the air line. The plaintiff's witness, Niek Kahl, states that the lack of air could be [fol. 183] caused from a defect in the pumps. He states, "The pump might be worked and not give sufficient air." (S. F. p. 4.)

There is no competent testimony in the record that the National Shipbuilding Company was a subscriber under the Compensation Law of Texas at the time of Boudreux's death, and there is no competent testimony that the Millers' Indemnity Underwriters had any connection with this case. The award made by the Industrial Accident Board, or rather the refusal of the Board to award compensation to anyone, was not introduced in evidence. The report of death of O. O. Boudreux, made as "Exhibit A" to the Statement of Facts on page 64 thereof was excluded by the Court, except the date thereof and the item contained therein that Boudreux's wage was \$300.00 per month, and all of said report is incompetent as is especially provided by the Compensation Law.

Appellant interposed a plea to the jurisdiction, raising the admiralty question (Tr. p. 11), and at the conclusion of the evidence presented its motion to dismiss this cause (Tr. p. 15). Appellant also asked for an instructed verdict (Tr. p. 24) and took due exception to the action of the Court in entering judgment against it. See defendants' Bill of Exception 1 and 2 (Tr. pp. 26, 29).

Authorities

(a) The workmen's compensation law does not cover cases within the admiralty jurisdiction:

Article 3, Section 2, Constitution of the United States.
Southern Pacific v. Jensen, 244 U. S., 205; 61 L. Ed., 1083.
Knickerbocker Ice Co. v. Stewart, 253 U. S., 149; 64 L. Ed., 834.

[fol. 184] *Chelentis v. Luehenback*, 247 U. S., 372; 62 L. Ed., 1171.
Union Fish Co. v. Erickson, 248 U. S., 308; 63 L. Ed., 261.
Peters v. Veasey, 251 U. S., 121; 40 S. C. 4, 65.
Roode v. Grant Smith Porter Co., 259 Fed., 304.
London G. & S. A. Co. v. Sterling, 124 N. E., 286 (Mass.).
Dorman's Case, 129 N. E., 352 (Mass.).

Sudden v. Ind. Acc. Com., 186 Pac., 803 (Cal.)
 Compaccio v. P. R. Co., 182 N. Y. S., 807.
 Divorkowity v. Hurlen R. T. Line, 183 N. Y. S., 458.
 Grant-Smith-Porter Ship Co. vs. Rhode, 66 L. Ed., 172.
 Western Fuel Co. vs. Gareia, 66 L. Ed., 97.
 Industrial Commission vs. Nordenhold Co. 66 L. Ed., 567.

(b) This case falls within the admiralty jurisdiction since it occurred upon a barge floating upon navigable waters:

Atlantic Transport Co. v. Imbrokek, 234 U. S., 52; 58 L. Ed., 1208.
 Northern Pacific S. S. Co. v. Hall, 249 U. S., 119; 63 L. Ed., 510.
 The Plymouth, 3 Wall., 20; 18 L. Ed., 125.
 Johnson v. Elevator Co., 119 U. S., 388; 30 L. Ed., 447.
 The Blackheath, 195 U. S., 361; 40 L. Ed., 239.
 Waring v. Clark, 5 How., 459; 12 L. Ed., 235.
 N. J. Steam Nav. Co. v. Merchants Bank, 6 How., 344, 394; 12 L. Ed., 465, 487.
 The Commercee, 1 Black, 574; 17 L. Ed., 107.
 Goldman, Etc., Co. v. R. I. Bridge Co., 6 Wall., 213; 18 L. Ed., 753.
 The Belfast, 7 Wall., 624, 637; 19 L. Ed., 266, 269. Ex Parte Easton, 95 U. S., 68; 24 L. Ed., 373.
 Leathers v. Blessing, 105 U. S., 626; 26 L. Ed., 1192.
 [fol. 185] Panama R. Co. v. Napier, 166 U. S., 280; 41 L. Ed., 1004.
 Cleveland & Co. v. S. S. Co., 208 U. S., 316; 52 L. Ed., 508.
 Martin v. West, 222 U. S., 191; 56 L. Ed., 159.
 Holmes v. O. C. R. Co., 5 Fed., 75.
 The Arkansas, 17 Fed., 383.
 The F. & P. M., 33 Fed., 511.
 The H. S. Pickands, 43 Fed., 239.
 Hermann v. Port Blakely Mill Co., 69 Fed., 646.
 The Strabo, 90 Fed., 110.
 Swanne v. Borseh, 226 Fed., 581.
 Gordon v. Drake, 159 N. W., 340.
 Schoughnessy v. Steamship Co., 162 Pac., 546.
 Keaton v. Rock Plaster Co., 256 Fed., 574.
 Case Note, 16 Harvard Law Review, 210.
 Case Note, 18 Harvard Law Review, 299.
 Case Note, 25 Harvard Law Review, 381.

(c) There can be no question but that a navigable river is within the admiralty jurisdiction:

Ebb and Flow doctrine overruled: doctrine established extending admiralty jurisdiction wherever ships float and navigation sufficiently aids commerce, whether internal or external;

The Tennessee Chief, 12 How., 441; 13 L. Ed., 1058.

Collision on Mississippi River within admiralty jurisdiction.

Fretz v. Bull, 12 How., 466; 13 L. Ed., 1068.

Collision on Alabama River in the body of the county and above the tide held within admiralty jurisdiction:

Jackson v. Steam Boat Magnolia, 20 How., 296; 15 L. Ed., 909.

Collision on Mississippi near St. Louis is within admiralty jurisdiction:
[fol. 186]

The Ad. Hine v. Trevor, 4 Wall.; 18 L. Ed., 451.

Collision on canal connecting Great Lakes and Mississippi held within admiralty jurisdiction:

Ex Parte Boyer, 109 U. S., 629; 27 L. Ed., 1056.

Boat involved not capable of going off of river operated between two points in same state thereupon was held within admiralty jurisdiction:

The Daniel Ball, 10 Wall., 557; 19 L. Ed., 999.

River though difficult of navigation and only navigable with locks is subject to admiralty jurisdiction:

The Montello, 20 Wall., 430; 22 L. Ed., 391.

The Savannah River from its mouth to the highest point to which it is navigable is subject to admiralty jurisdiction:

Ex Parte Garnett, 141 U. S., 1; 35 L. Ed., 631.

Chicago River nearly all navigable within the City of Chicago is within admiralty jurisdiction:

The Excanoba, Ete., Co. v. Chicago, 107 U. S., 678; 27 L. Ed., 442.

East River in New York is subject to admiralty jurisdiction:

Miller v. N. Y., 109 U. S., 385; 27 L. Ed., 971.

The Erie Canal lying wholly within New York State is a navigable stream within admiralty jurisdiction:

Perry v. Haines, 191 U. S., 17; 48 L. Ed., 731.

(d) A barge such as one involved here is within the admiralty jurisdiction:

A barge held to be a ship or vessel:

Knickerbocker Ice Co. v. Stewart, 253 U. S., 149; 64 L. Ed., 834; 123 N. E., 382.

The Diek Keys Federal Case, 3898.

[fol. 187] Disbrow v. Walsh Bros., 36 Fed., 608.

The Wilmington, 48 Fed., 567.

Ex Parte Easton, 95 U. S., 68; 24 L. Ed., 373.

Bath House:

The Public Bath, No. 13, 61 Fed., 692.

Canal Boat:

The Kate Tremaine, Fed. Cases, 7622.

Canal Boat with Grain Elevator:

The Baldwin, Federal Cases, 6448.

Dismantled Steam Boat:

The Old Natchez, 9 Fed., 476.

The City of Pittsburgh.

Dry Dock:

The Robert W. Parsons, 191 U. S., 17; 48 L. Ed., 73.

The Steamship Jefferson, 215 U. S., 130, 142; 54 L. Ed., 125.

The Hugo Patagonia, 235 Fed., 92.

All navigable structures intended for transportation fall within admiralty jurisdiction after launched:

Cope. v. Dry Dock Co., 119 U. S., 25; 20 L. Ed., 501.

Remarks

Regardless of whether or not the provisions of the Compensation Law had been invoked, the facts very plainly established that this is a cause exclusively cognizable in a Court of Admiralty, and that the District Court of Orange County, Texas, had no jurisdiction thereof at any event. The Court has taken judicial knowledge of the fact that the Sabine River, upon the waters of which this death [fol. 188] occurred, is not within the boundaries of the State of Texas, but that it forms the boundary line between the States of Louisiana and Texas. It is undisputed that this is a navigable stream, and it is undisputed that the death occurred upon the waters of this stream. This being an action of tort, the place where the tort was committed fixes the jurisdiction. As said in the very recent case of Grant-Smith Porter Ship Co. vs. Herman F. Rhode, U. S. Supreme Court decision, 66 L. Ed. 172: "The general doctrine that, in contract matters, admiralty jurisdiction depends upon the nature of the trans-

action, and in tort matters upon the locality, has been so frequently asserted by this Court that it must now be treated as settled." The Supreme Court cites many cases in support of the doctrine announced. We consider this purely an action of tort, and the nature of the contract is immaterial, since the tort happened upon navigable waters. However, the contract of employment, as well as the nature of the work was maritime. Mr. Boudreux was employed as a marine diver. He was working from a floating barge, and his work was to remove an obstruction to commerce from the bed of the Sabine River. In this case, the employment or contract is maritime in its nature and the rights and liabilities of the parties is prescribed by general rules of maritime law essential to its proper harmony and uniformity. See Southern Pac. Ry. Co. vs. Jensen 244 U. S. 205; 61 L. Ed., 1086, L. R. A. 1918, C. 451, 14 N. C. C. A. 596; Chelentix vs. Luckenback S. S. Co., 247 U. S. 372, 63 L. Ed. 1191, 19 N. C. C. A. 309; Union Fish Co. vs. Erickson, 248 U. S. 308, 63 L. Ed. 261; Knickerbocker Ice Co. vs. Stewart 253 U. S. 149, 64 L. Ed. 834.

That the boat upon which he was working, or rather from which he was working, is a vessel within admiralty, we cite the cases of *In re P. Sanford Ross*, 196 Fed. 921; *Charles Barnes vs. One Dredge [fol. 189] Boat*, 169 Fed. 895, Lc. 897; *Bowers Hydraulic Dredging Company vs. Federal Contracting Company*, 148 Fed. 290.

The work on a pile driver has been held to be maritime work in the case of *Lawrence vs. Flatboat*, 84 Fed. 200. The fact that Boudreux went below to work upon piling under the water, driven into the bed of the river, does not keep it from being a maritime tort. See *The Blackheath*, 195 U. S. 361, 49 L. Ed. 236. In 1 C. J. 1287, it is said:

"Where the consummation of the injury happens upon navigable water, the case is one within the admiralty jurisdiction, and it is immaterial that it originated on land. And the rule applies where the injury is done by the land itself or property attached to the land; thus, admiralty has jurisdiction over an injury to a vessel on navigable water caused by a defective pier or wharf, or by a bridge or draw."

Now, if we take the theory of the case that Boudreux's death was caused from the pumps not giving sufficient air, then, the ways attached to the bottom of the river had nothing to do with it. In view of the jury's verdict, it seems that this theory is the only tenable one, for no entanglements were discovered in the air line leading to Boudreux's body. If that is the case, the cause of the death originated and culminated upon the vessel, and is purely maritime in its nature. But if the theory that Boudreux's air line became entangled in the timbers is adopted, the cause of the death is none the less maritime. Every species of tort, however occurring, and whether on board a vessel or not, if upon the high seas, or navigable waters, is of admiralty cognizance. *The Plymouth 3 Wall.* 20, 36, 18 L. Ed. 125; *Proctor vs. Dillon* 235 Mass. 541.

[fol. 190] During the year 1922 three cases have been decided by the Supreme Court of the United States, that is, Industrial Commission vs. Nordenholt, 66 L. Ed. 567; Western Fuel Co. vs. Gareia, 66 L. Ed. 97; and the Grant-Smith Porter Ship Co. vs. Rhode, 66 L. Ed. 172, and in the Nordenholt case, Justice McReynolds reiterates the doctrine announced in the Jensen case, and we most earnestly submit that that doctrine applies to this case.

In our assignments and propositions we have endeavored to raise all the objections that were leveled at the judgment of the Court in the case of Southern Pacific vs. Jensen 244 U. S. 205, 61 L. Ed. 1086, and in the case of Home Life and Accident Company vs. Wade, 236 S. W. 778, and we submit that this cause should be disposed of in the same manner, reversed and rendered.

Argument under Sixth Proposition

The sixth proposition raises the point that the judgment in this case applying the compensation law to the facts of this case constitutes a regulation of and burden upon commerce among the several states and is in violation of Article 1, Section 8 of the Constitution of the United States.

Statement

The following excerpt from the testimony of the witness, And Arrington, is adopted in its findings by the Court of Civil Appeals:

"Yes, sir, ocean going vessels come in and out of this river all the time, and the tide comes up this river past Orange."

The following excerpt from the testimony of L. J. Kerr is also [fol. 191] adopted by the Court of Civil Appeals in its findings:

"Yes, sir, that was an obstruction to navigation, and we were taking the obstruction away."

The Court of Civil Appeals also makes the following observation:

"The record does not disclose in detail the character of the business of the National Shipbuilding Company. The deceased met his death on the first day of his employment as a diver. The terms of his contract with the National Shipbuilding Company, its duration and the character of the work to be performed by him are not shown by the record, other than as disclosed in the testimony copied above."

Authorities

U. S. Constitution Art. 1, Sec. 8.

Peterson vs. Railway Co. 57 L. ed. 1086.

Southern Pacific Ry Co. vs. Jensen 61 L. Ed. 1086.

Commerce among the several States includes the navigation of public waters for the purpose of the transportation.

- Gloucester Ferry Co. vs. Pa. 114 U. S. 203, 29 L. Ed. 158.
- State Tonnage Tax cases 12 Wall 214, 20 L. Ed. 370.
- The Lewellyn 4 Biss. 156, 15 Fed. Case. No. 8, 307.
- Blanchard vs. The Brig Martha Washington 1 Cliff, 463, 3 Fed. Case. No. 1, 513 affirming the Martha Washington, 3 Ware 245, 16 Fed. Cas. No. 9, 148.
- Gilman vs. Philadelphia 3 Wall. 724, 18 L. Ed. 96.

Commerce embraces appliances necessarily employed in carrying on transportation by land and water:

- Chicago Etc. Ry. Co. vs. Fuller 17 Wall. 568, 21 L. Ed. 710.
- Sweat vs. Boston Etc. Ry. 3 Cliff. 339, 23 Fed. Cas. No. 13, 684.

[fol. 192] Harbor Improvements 22 Op. Atty. Gen. 647.

Navigable Waters 22 Op. Atty. Gen. 501.

The power of Congress extends to all instrumentalities of such commerce, and to every device that may be employed to interfere with the freedom of commerce among the States and with foreign nations:

- Northern Securities Co. vs. U. S. 193 U. S. 344, 48 L. Ed. 679.
- Hopkins vs. U. S. 171 U. S. 597, 43 L. Ed. 290.

Remarks

So far as this record discloses, the National Shipbuilding Company, the employer of deceased, and the deceased, himself, were engaged in removing an obstruction to commerce from the bottom of the Sabine River at Orange, Texas. This river is a channel of interstate and international commerce. The witness, And Arrington, states that ocean going vessels come in and out of this river all the time. Therefore, the work in which the deceased and the Shipbuilding Company was engaged at this time related directly to interstate and international commerce, and is controlled by Art. 1, Section 8 of the Constitution of the United States. The Employers Liability Act of Texas substitutes for the common law an exclusive remedy, which is in direct violation of the Admiralty rules of procedure, as well as of damages. It is also in violation of and wholly different from the rules applied by the Federal Courts in causes of action arising under the interstate commerce laws. It was held in the case of Peterson vs. Railway Company, 57 L. Ed. 1125, that a party who was engaged in carrying bolts and nails to a railroad bridge, which were to be used the next day in repairing the bridge, was engaged in interstate commerce. Here is a case much stronger where the deceased was engaged [fol. 193] directly at work in removing the obstruction from commerce, and we submit that his cause of action falls within and under Art. 1, Sec. 8 of the Constitution of the United States.

This same contention was sustained in the case of Southern Pacific Railway Company vs. Jensen, 61 L. Ed. 1086, and in the case of Knickerbocker Ice Company vs. Stewart, 64 L. Ed. 834, it was held

that the Compensation Law of New York, an act similar to the Texas law, was invalid as applied to causes falling under the commerce clause and admiralty jurisdiction of the United States. We take it that it can hardly be contended that the Texas Workmen's Compensation Act applies to injuries arising out of interstate commerce. The facts found by the Court of Civil Appeals, as well as all the facts of the whole case, place this cause squarely under the commerce clause of the Constitution of the United States, and the Compensation Act of Texas, being an act which is contrary to and destroys the proper harmony and uniformity of the general laws of the United States as applied to interstate commerce, constitutes a regulation thereof and a burden thereupon, and the compensation law must yield to the higher authority of the Federal law.

We earnestly pray a careful consideration of the authorities cited, and we ask this Court to apply the law as decided in the Jensen case, the Knickerbocker case and the Wade case, which we submit to be still the law, especially so stated in the Nordenholdt case, and that this cause be reversed and rendered.

Conclusion

We regret that it has been necessary to make this application so lengthy, but the importance of the case, not only as to the amount involved but as to the compensation law generally and its application to [fol. 194] employers and employees, in this State makes the case one worthy of more than ordinary attention.

Your petitioner prays that this petition be granted and writ of error be allowed for the correction of the errors complained of and that upon hearing the judgment of the Honorable Court of Civil Appeals for the Ninth Supreme Judicial District of Texas, at Beaumont, and of the trial court be reversed and judgment be rendered in favor of the plaintiff in error. In the alternative, it is prayed that the cause be reversed and remanded.

Your petitioner respectfully shows that at the time of filing of this application there has been deposited with the Clerk of the Honorable Court of Civil Appeals for the Ninth Supreme Judicial District at Beaumont a true copy of this application to be delivered to the defendants in error and that the attorneys of record for the defendants in error have been notified of the filing of this application and of the depositing of copy thereof.

The defendants in error are represented by Howth & O'Fiel, attorneys, Beaumont, Texas.

Respectfully submitted,

Morris & Barnes, Attorneys for Plaintiff in Error, Millers
Indemnity Underwriters.

[File endorsement omitted.]

[fol. 195]

IN SUPREME COURT OF TEXAS

[Title omitted]

ORDER ALLOWING WRIT OF ERROR—Filed January 31, 1923

This day came on to be heard the application of Plaintiff in Error for a Writ of Error to the Court of Civil Appeals for the Ninth District and the same having been duly considered, it is ordered that the application be granted and the Writ of Error issue as prayed for.

IN SUPREME COURT OF TEXAS

ORDER REFERRING CASE TO COMMISSION OF APPEALS—Filed December 19, 1923

The following cases were to-day referred by the Supreme Court to Section "A" of the Commission of Appeals for examination and report:

3935

MILLERS INDEMNITY UNDERWRITERS

vs.

E. J. BOUDREAUX et al.

Orange County, Ninth District
and other cases.

[fol. 196]

IN SUPREME COURT OF TEXAS

[Title omitted]

OPINION FROM COMMISSION OF APPEALS AND ORDER APPROVING SAME—Filed April 23, 1924

There is only one question of real importance to be decided by this court in this case. This question goes to the jurisdiction of the district court of Orange county to consider and pass upon the merits of the case.

The suit was instituted by defendants in error to set aside the award of the Industrial Accident Board, and to recover compensation for the death of O. O. Boudreux. Judgment was entered by the district court in favor of Mrs. E. J. Braud, one of the defendants in error, and this judgment was affirmed by the Court of Civil Appeals at Beaumont. 245 S. W. 1025.

At the time of his death Boudreux was employed as a diver by the National Shipbuilding Company, and was working in the waters of

the Sabine river, which is admittedly a navigable stream. There is nothing in the record to disclose the general character of the business of the National Shipbuilding Company, but there is enough from which it is inferred that for one thing it was engaged in the building and launching of ships. Nor are the terms of the contract of employment between the company and Boudreaux shown. At the time of his death Boudreaux was sent down into the water of the Sabine [fol. 197] river, in the full equipment of a diver, from a small barge or boat, which had on it a little house or dressing room, pumps and equipment. This barge, or pontoon, as it is called, had no means of self-propulsions, but was towed about with a skiff. It seems to have had no use except in connection with the diving. As to the particular work being done by Boudreaux the witness Arrington testified:

"The kind of work he was doing there was diving. As to what his purpose was, well, we were fixing to launch a ship, and he was adjusting some kind of bolts, or sawing off piling, or something. He was working on the ways. Yes, sir, the ways are attached to the soil, the bank of the river. As to whether it is a sort of wharf; it is timbers to launch a ship on, and as it goes in the water, of course, it goes deeper. Yes, sir, these ways are constructed by driving piling from the shore out into the river at right angles to the river, and sawing them off so that as they go out from the shore they are inclined. He was working on the piling in the river, which was a part of the ways constructed for launching a ship."

Kerr, who was foreman in charge of the work, testified:

"As to the nature of the work he was doing, it was a set of ways that was formerly used for launching ships and the National Shipbuilding Company decided to do away with that set of ways, or part of it—a hundred feet of it—in order to extend the wharf, and we were dismantling and cutting out those ways. There was no boat on those ways. The last one had been launched on that set of ways. We were dismantling them in order to extend the wharf so as to dismantle some boats the National Shipbuilding Company had [fol. 198] bought. Yes, sir, we were taking those out to get the boats in. Yes, sir, that was an obstruction to navigation, and we were taking the obstruction away."

Boudreaux was working under the water about 35 feet from the bank of the stream. Under this state of facts plaintiff in error contends that the action is one exclusively cognizable in a court of admiralty, and that therefore the district court of Orange County had no jurisdiction. We have delayed consideration of this case somewhat waiting for the published report of the decision by the Supreme Court of the United States in the consolidated case of State of Washington v. W. C. Dawson & Co. and Industrial Accident Commission v. James Rolph Co., 68 Law Ed. 339, Advance Sheet March 15, 1924. However this decision merely confirms the prior holding of Knickerbocker Ice Co. v. Stewart, 253 U. S. 149, 64 Law

Ed. 834, in holding that Congress cannot, under the Federal Constitution, make applicable to persons engaged in maritime service the provisions of state Workmen's Compensation Acts. We are thrown back to the question of whether or not Boudreux, at the time of his death, was engaged in maritime service, or was performing work under a strictly maritime contract of employment.

The Supreme Court of the United States has recently said:

"The general doctrine, that in contract matters admiralty jurisdiction depends upon the nature of the transaction, and in tort matters upon the locality, has been so frequently asserted by this court that it must be treated as settled."

The cause of action here is not predicated primarily upon a tort. On the contrary it grows directly out of the contract of employment [fol. 199] between the parties, upon the theory that the compensation law of the state is read into and became a substantial part of this contract. The element of wrongdoing does not enter into the question of compensation. It follows, therefore, that the present case must be tested by the principle applicable to contract matters; and the question of admiralty jurisdiction must be determined by the subject-matter of the contract—the nature and character of the work being done. *Grant Smith-Porter Ship Co. v. Rhode*, 66 Law Ed. 321, *Post v. Burger et al.*, 216 N. Y. 544, Ann. Cases, 1916B 158, *Berry v. Donovan & Sons*, 120 Me. 457, 25 A. L. R. 1021. Perhaps the most appropriate test of determining whether or not a contract is a maritime one or not is that laid down recently by the Federal Court in the case of *The W. T. Blunt*, 291 Fed. 901:

"If a contract pertains to maritime service or a maritime transaction, that is, if it has a direct or substantial connection or relation to navigation, it is maritime in nature and may afford a sufficient basis for the jurisdiction of a court of admiralty. On the other hand, if such contract is not so related to navigation, even though it refers to a vessel, for example, if it does not tend to enable or aid a vessel to engage in navigation or otherwise pertain to navigation, it cannot be properly termed a maritime contract nor be enforced in a court of admiralty."

The rule is stated in 1 C. J. 1266 as follows:

"A maritime contract must therefore concern transportation by sea, it must relate to navigation, and to maritime employment; it must be one of navigation and commerce on navigable waters. It is not enough that the service which sprang from the contractual [fol. 200] relation be performed on water, or even that it be done on board, and for the benefit of a vessel which is afloat."

Tested by these rules we have no difficulty whatever in arriving at the conclusion that the contract between Boudreux and the National Shipbuilding Company (judged by the nature of the work he was doing at the time) was in no sense a purely maritime con-

tract, such as would confer exclusive jurisdiction on a court of admiralty. The work being done by Boudreux was on the ways constructed for launching ships. The ways are constructed by driving piling from the bank out into the river, and are simply appurtenant to or a necessary part of the docks or wharf. They are merely a continuation or extension of the land structures which are used in connection with the construction of vessels and their launching; and we think it is conclusive that no contract relating to the construction of a vessel may be said to be a maritime contract until the vessel has actually been launched upon navigable waters. The case of *Cleveland Terminal & Valley Railroad Co. v. Cleveland Steamship Co.*, 208 U. S. 316, 52 Law Ed. 508, bears on this question. That was a suit for damages to dock, pier, piling, etc., and in discussing the matter of jurisdiction the court say:-

"The bridges, shore, docks, protection piling, piers, etc., pertain to the land. They were structures connected with the shore and immediately concerned commerce upon the land. None of these structures were aids to navigation in the maritime sense, but extensions of shore and aids to commerce on land as such."

In the recent case of *Southern Lighterage & Wrecking Co. v. United States*, 284 Fed. 978, (affirmed in 43 Sup. Ct. 91) it is held that a group of piles in the Mississippi river at the foot of a street [fol. 201] in New Orleans, used for the mooring of vessels or to keep them in deep water while unloading, were a land structure and not an aid to navigation, and suit for injury to them was not within admiralty jurisdiction.

These cases while not direct authority on the question under consideration, clearly demonstrate that a contract with reference to such structures as these, or work being done in connection with them, would not be of a maritime nature. The fact that the ways on which Boudreux was working may have incidentally been an obstruction to navigation is not sufficient to give to the contract an exclusive maritime character. The foreman Kerr stated that the ways were being removed for the purpose of extending the wharf, and therefore the work being done was really incidental to the work of building or extending the wharf, and a wharf has always been held to be a land structure and intended to facilitate and aid land commerce.

The Lemond Case by the Supreme Court of Maine, decided March 12, 1923, and reported in 119 Atlantic, 864, is a case similar to the present one, and in that case the court held that the Workmen's Compensation act applied.

At the most the contract under consideration here did not go beyond what has been termed "maritime and local in character." As an illustration of what is meant by such a contract we call attention to the case of *Grant Smith-Porter Ship Co. v. Rhode*, *supra*. In that case a carpenter was injured while doing work on an incomplete vessel which had been launched and was lying upon

navigable waters. It was held that the general admiralty jurisdiction extended to such a case, but it was also held:

"A shipbuilding company and a carpenter employee having both accepted and proceeded under a state workmen's compensation [fol. 202] statute by making payments to an industrial accident fund cannot be said to have contracted consciously with each other in contemplation of the general system of admiralty law governing their rights, obligations, and consequent liabilities in case the employee should be accidentally injured while engaged in the work of finishing an incompletely vessel lying on navigable waters within the state."

In the present case it has been held, (and we think correctly) that the National Shipbuilding Company was a subscriber under the provisions of the Workmen's Compensation Law and the contract between that company and Boudreux was made subject to that law; and, the action being one not exclusively within admiralty jurisdiction, the provisions of the Compensation Law furnish the exclusive method of procedure.

This rule of giving application to the state Compensation Laws in cases which are maritime but local in character has recently been applied in several cases; and if it be conceded that the employment here partakes somewhat of a maritime nature, yet if the general employment contracted for and the work being done did not have a direct relation to navigation or maritime commerce, then the State court had jurisdiction and the Compensation Law was applicable. *State Ind. Com. v. Nordenholz Corp.*, 66 Law Ed. 933, *Travelers' Ins. Co. v. Bacon* (Ga.), 119 S. E. 458, *Zahler v. Department of Labor* (Wash.), 217 Pac. 55, *Berry v. Donovan & Sons*, supra, *Lermond's Case*, supra, *Boekhop v. Phoenix Transit Co.* (N. J.), 117 Atl. 624, *Los Angeles S. & D. Co. v. Ind. Acc. Com.* (Cal.), 207 Pac. 416, *Wooley v. Wichert Co.* (Pa.), 118 Atl. 765, *Lawton v. Diamond C. & C. Co.* (Pa.), 115 Atl. 886.

We have therefore concluded that if we apply to rule applicable to contract matters, or if we apply the rule with reference to tort matters, in either event the work being done here was not of such an exclusive maritime nature, in view of the fact that the contract [fol. 203] clearly did not contemplate any dominant Federal rule concerning liability, as to make the case fall exclusively within admiralty jurisdiction so that "application of the local law would work material prejudice to some characteristic feature of the general maritime law."

We have carefully considered the cases relied upon by plaintiff in error, as well as many others. The cases of *De Gaetano v. Merrit- & Chapman Co.*, 195 N. Y. Supp., 573, and *Norman v. Merrit- & Chapman Co.*, 193 N. Y. Supp. 195, are easily distinguished from this case and those we have cited. In those cases the persons who lost their lives were each held to be "seamen" engaged in services upon a "vessel," as each of those terms have been defined by Federal statutes and decisions. We do not see how it can be seriously con-

tended that in this instance Boudreaux could be considered a "seaman" or engaged in work upon or connected with a vessel.

The other questions raised by plaintiff in error have been fully, and we think very ably, discussed by the Court of Civil Appeals, and in our opinion have been correctly decided. It is therefore unnecessary for us to discuss them at length.

We recommend that the judgment of the Court of Civil Appeals and of the district court be affirmed.

S. H. German, Presiding Judge. SHG-vs.

[File endorsement omitted.]

[fol. 204]

[Title omitted]

The judgment recommended in the report of the Commission of Appeals is adopted and will be entered as the judgment of the Supreme Court.

C. M. Cureton, Chief Justice.

IN SUPREME COURT OF TEXAS

[Title omitted]

JUDGMENT—Filed April 23, 1924

This cause having been referred to the Commission of Appeals for their examination and report and said Commission having reported in a written opinion by Hon. S. H. German, Presiding Judge of Section "A," that there was no error in the judgments of the Court of Civil Appeals and District Court, and recommending that said judgments be affirmed and said report together with the record in the cause having been duly considered, and the judgment as recommended by the Commission of Appeals having been approved by the court, it is therefore ordered, adjudged, and decreed that the [fol. 205] judgments of the Court of Civil Appeals and District Court be in all things affirmed. That the defendants in error, Mrs. E. J. Braud, joined pro forma by her husband E. J. Braud, do have and recover of and from the plaintiff in error, Millers Indemnity Underwriters, and its surety, subscribers at American Lloyds of Dallas, composed of the following: Bailey & Collins, 15.2%, Vose, Alden H., 5%, Wooten, R. L. 5%, Collins, Carr P. 3½%, Simmons, J. W. Jr., 3%, Vose, R. A. 2½%, Chatfield, Geo. A. 2%, King, A. E. 2%, Jones, Roy B. 1½%, Anderson, F. E. 1¼%, Anderson, M. D. 1¼%, Clayton, Benj. 1¼%, Clayton, W. L. 1¼%, Aldridge, J. H. 1%, Ambrister, W. E. 1%, Anderson, B. L. 1%, Astin, E. H. 1%, Bell, Bryan 1%, Bellis, J. H. 1%, Bond, Daniel 1%, Byram, J. E.

1%, Cash, Benj. D. 1%, Fain, Earl 1%, Fix, G. G. 1%, Fortson, Joe B. 1%, Fortson, Jno. I. 1%, Frierson, A. A. 1%, Geer, B. E. 1%, Golding, Chas. D. 1%, Geer, D. Edward 1%, Hamilton, G. M. 1%, Hamilton, R. L. 1%, Head, W. B. 1%, Hobby, Edwin 1%, Houston, H. B. 1%, Hudgins, John A. 1%, Hutson, L. C. 1%, Ives, C. L. 1%, Kennedy, J. B. 1%, Kuttsehart, E. R. A. 1%, Lawton, J. J. 1%, Le Clercq, J. R. Sr. 1%, Le Clercq, J. S. Jr. 1%, Lipsecomb, J. N. 1%, Lowe, W. D. 1%, Mitchell, Homer R. 1%, Norwood, J. W. 1%, Oliver, R. 1%, Pendleton, W. F. 1%, Simmons, R. M. 1%, Smith, F. M. 1%, Sypert, W. S. 1%, Timberlake, C. G. 1%, Trimble, E. G. 1%, Underwood, J. A. 1%, Woodall, Ed. 1%, Woodrow, M. E. 1%, Wright, J. V. 1%, Fort, R. W. 7/10 of 1%, Bell, A. H. 6/10 of 1%, Bell, H. R. 1/2 of 1%, Caldwell, J. B. 1/2 of 1%, Crow, R. F. 1/2 of 1%, Davis, T. J. 1/2 of 1%, Dillingham, E. K. 1/2 of 1%, Duke, C. L. 1/2 of 1%, Garrow, H. W. Jr. 1/2 of 1%, Hulsey, B. B. 1/2 of 1%, Kennedy, R. A. 1/2 of 1%, Moughon, E. C. 1/2 of 1%, Myers, W. Jr. 1/2 of 1%, Robinson, O. B. 1/2 of 1%, Sherman, W. A. 1/2 of 1%, Smith, Loyd B. 1/2 of 1%, Tripp, C. G. 1/2 of 1%, Van Ness, J. R. 1/2 of 1%, Wilbor, S. W. 1/2 of 1%, Wise, E. L. 1/2 of 1%, the amount adjudged in the District Court together with all costs in this behalf expended in this Court, the Commission of Appeals, and the Court of Civil Appeals, and this decision be certified to the District Court for observance.

[fol. 206] [File endorsement omitted.]

IN SUPREME COURT OF TEXAS

[Title omitted]

MOTION FOR REHEARING AND ORDER OVERRULING SAME—Filed May 14, 1924

To the Honorable Supreme Court of Texas:

Now comes the Plaintiff in error, Millers' Indemnity Underwriters, [fol. 207] and moves the court to set aside its judgment and order affirming the judgments of the District Court and the Court of Civil Appeals and grant the Plaintiff in Error a rehearing herein, and that upon such rehearing this cause be reversed and rendered, or in the alternative that this cause be reversed and remanded. For grounds of this motion the Plaintiff in Error would respectfully submit the following:

First Ground

The Supreme Court of Texas erred in overruling and refusing to sustain Plaintiff in Error's first assignment of error, submitted as a proposition in its application for Writ of Error, which assignment is as follows:

"The Court of Civil Appeals erred in refusing to sustain the appellant's First Proposition in its brief and assignments related thereto, said proposition being as follows:

"It appearing from the undisputed evidence that the deceased, O. D. Boudrœux, at the time of his death was engaged in submarine diving in the waters of a public navigable stream, attempting to clear the waters of said stream of an obstruction to navigation beneath the waters of said stream, and working from and attached to a barge floating upon the waters of said stream about thirty-five feet from shore, and that he was working from and attached to said barge by a life line and air hose being his only connection with the outside world, the cause of action for his death while so engaged is of an admiralty and maritime nature, and exclusively cognizable in a court of admiralty by virtue of article 3, Section 2, of the Constitution of [fol. 208] the United States. (Germane to assignments Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, and 22.)" (Being the First Proposition in appellant's brief in the Court of Civil Appeals and the first ground in the Motion for Rehearing.)

Second Ground

The Supreme Court of Texas erred in overruling and refusing to sustain Plaintiff in Error's second assignment of error, submitted as a proposition in its Application for Writ of Error, which assignment is as follows:

"The Court of Civil Appeals erred in refusing to sustain the appellant's Second Proposition in its brief and assignments related thereto, said proposition being as follows:

"It appearing from the undisputed evidence that this cause was of an admiralty and maritime nature, the action of the district court of Orange County, Texas, in entering judgment against appellant under the Workmen's Compensation Law of Texas, was an erroneous exercise of authority under a Statute of the State of Texas, in violation of Article 3, Section 2 of the Constitution of the United States, which article and section place the jurisdiction of admiralty and maritime cases exclusively in the Courts of the United States. (Germane to assignments Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, and 22.)" (Being Second Proposition in appellant's brief in the Court of Civil Appeals and second ground in the Motion for Rehearing.)

[fol. 209]

Third Ground

The Supreme Court of Texas erred in overruling and refusing to sustain Plaintiff in Error's third assignment of error, submitted as a proposition in its Petition for Writ of Error, which assignment is as follows:

"The Court of Civil Appeals erred in refusing to sustain the Appellant's Third Proposition in its brief and assignments related thereto, said proposition being as follows:

'It appearing from the undisputed evidence that the cause was of an admiralty and maritime nature, the action of the Court in entering judgment against appellant, was an erroneous holding that appellee had a right of action under the Workmen's Compensation Law of Texas against appellant in addition to the remedies given appellees by admiralty jurisdiction, and was an exercise of an authority under said Workmen's Compensation Law of Texas in violation of the Fourteenth Amendment to the Constitution of the United States, in that it denies to appellant the equal protection of he law, because said compensation law does not afford an exclusive remedy, but leaves the employer and his property subject to a suit in admiralty, and the insurer under the compensation law of Texas liable to pay such judgment, subjeeting it to double damages. (Germane to assignments Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, and 22.)" (Being third proposition in appellant's brief in the Court of Civil Appeals and third ground in the Motion for Rehearing.)

[fol. 210]

Fourth Ground

The Supreme Court of Texas erred in overruling and refusing to sustain Plaintiff in Error's fourth assignment of error, submitted as a proposition in its application for Writ of Error, which assignment is a follows:

"The Court of Civil Appeals erred in refusing to sustain the Appellant's Fourth Proposition in its brief and assignments related thereto, said proposition being as follows:

"The Workmen's Compensation Law of Texas is invalid under the Constitution of the United States in so far as it applies to admiralty and maritime causes, and the undisputed evidence showing this to be a cause of admiralty and maritime nature, this cause should have been dismissed for want of jurisdiction. (Germane to assignments Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, and 22)" (Being fourth proposition in appellants brief in the Court of Civil Appeals and fourth ground in the Motion for Rehearing.)

Fifth Ground

The Supreme Court of Texas erred in overruling and refusing to sustain Plaintiff in Error's fifth assignment of error, submitted as a proposition in its Petition for Writ of Error, which assignment is as follows:

"The Court of Civil Appeals erred in refusing to sustain the Appellant's Fifth Proposition in its brief and assignments related thereto, said proposition being as follows:

'It appearing from the undisputed evidence that this is a cause of an admiralty and maritime nature, the action of the court in rendering judgment against appellant under the Workmen's Compensation Law of Texas, is in violation of the Fourteenth Amendment to the Constitution of the United States, because it de-

[fol. 211]

privies the appellant of its property without due process of law. (Germane to assignments Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, and 22.)" (Being fifth proposition in appellant's brief in the Court of Civil Appeals and fifth ground in the motion for rehearing.)

Sixth Ground

The Supreme Court of Texas erred in overruling and refusing to sustain Plaintiff in Error's Sixth Assignment of Error, submitted as a proposition in its Petition for Writ of Error, which assignment is as follows:

"The Court of Civil Appeals erred in refusing to sustain the Appellant's Sixth Proposition in its brief and assignments related thereto, said proposition being as follows:

"It appearing that the deceased was engaged in clearing a public navigable stream of an obstruction to commerce, the action of the court in entering judgment against the appellant was a holding that the Workmen's Compensation Law of Texas applies to interstate commerce, and therefore being an exercise of an authority under said Workmen's Compensation Law in violation of Article 1, Section 8 of the Constitution of the United States, in that it constitutes a regulation of and burden upon commerce among the several states. [fol. 217] (Germane to assignments Nos. 9, 10, and 22.)" (Being sixth proposition in appellant's brief in the Court of Civil Appeals and Sixth ground in the Motion for Rehearing.)

* * * * *

Brief of the Argument

Argument under First Proposition

Statement

The Statement in Plaintiff in Error's Petition for Writ of Error is here adopted and asked to be considered in this connection.

Authorities

The Authorities in Plaintiff in Error's Petition for Writ of Error are here adopted and asked to be considered in this connection.

Remarks

It is respectfully submitted that your Honors have disposed of this case upon the wrong theory, in that you disposed of the case on the theory that the cause of action herein is not predicated primarily upon a tort, but that on the contrary it grows directly out of the contract of employment between the parties. If the case could be disposed of upon that theory, there would be no basis for the

decision of the Supreme Court of the United States in the Jensen case. The primary cause, which is after all the basis of the cause of action in this cause, is the death of the diver, O. O. Boudreaux, which death was occasioned by a tort committed upon navigable [fol. 213] waters while the deceased was engaged in work of a maritime nature. The reason the Compensation Law cannot apply to a cause of an admiralty nature is that the admiralty law is an exclusive branch of federal jurisprudence which covers maritime torts. Now if we could say that the cause of action under a Workmen's Compensation Act which is occasioned by a maritime tort is based upon the contract of employment into which there as read the Compensation Law, then there would be no basis for any of the decisions of the Supreme Court of the United States holding that the Compensation Law of the different states cannot supersede the admiralty jurisdiction of the federal courts. As we said before, the body of admiralty laws is a distinct branch of jurisprudence. The Constitution of the United States gave that branch of jurisprudence to the federal courts. The rights and remedies under the admiralty law are defined by the ancient customs and usages relating to matters pertaining to the sea. The Compensation Law of the State seeks to substitute for those ancient customs and usages an altogether different scheme of recovery, as well as an entirely different body of laws. The Compensation Law cannot substitute its measure of damages, if you can call it a measure of damages, for the right of maintenance and cure given to an injured person by the laws of admiralty. No matter whether you consider the cause of action as predicated upon the contract of employment, or whether you consider it as predicated upon the tort, if the tort occurred upon navigable waters, the locality of the tort fixes the jurisdiction.

The Legislature of a state cannot do indirectly that which it is not permitted to do directly by virtue of an admiralty clause of the Constitution of the United States; neither can the courts, by construction, infringe upon the federal jurisdiction in equity. If we could say that this cause of action is predicated upon the contract of employment, which is governed by the Workmen's Compensation Act, then in every cause of an admiralty nature the court could say that the cause of action is not predicated primarily upon a tort, and in that manner the jurisdiction of the federal courts in equity would be entirely defeated, by doing indirectly what could not be done directly. We submit that it is conceded that the legislature of Texas cannot make a rule of law governing the rights and liabilities covered by the admiralty law. Since the legislature cannot do that directly, it certainly has no power to pass a Compensation Law based upon the contract of employment between the parties which would supersede the ancient customs and usages of admiralty. The Compensation Law provides an exclusive remedy. It provides that when a person is injured who is covered by this compensation law, he must take the compensation provided by the law, and the law furnishes his exclusive remedy. He cannot sue his employer as at common law. It is readily seen, therefore, that if this scheme

of compensation should be applied to matters of admiralty, there would be as many different schemes of compensation within the United States as there are states. It would destroy that uniformity provided by the admiralty law, which is so essential to the general application of the admiralty laws to maritime matters.

When the cases by the Supreme Court of the United States, cited as authority in the opinion by your Honors, are carefully analyzed, it is seen that in each of those cases the tort committed was one not covered by the admiralty law, that is, the torts happened upon land, or upon structures in no way connected with or relating to navigation. The case of Grant-Smith-Porter Company vs. Rhode, 66 L. Ed. 221, is such a case. If that opinion is carefully analyzed and the cases cited therein as supporting it are carefully considered, [fol. 215] it will be seen that the character of the tort there committed has never been considered as a maritime tort. The same is true with reference to the case of State Industrial Commission vs. Nordenholz Corp., 66 L. Ed. 933. In the latter case the accident happened upon land. The deceased was working on the dock, and it has always been held that such injuries were outside the admiralty law. What is said of those cases with reference to the application of the local law to some characteristic feature of the general maritime law is purely obiter dicta. A careful analysis of the Jensen case, 61 Law Ed. 1086; Knickerbocker case, 64 L. Ed. 834, and Great Lakes Dredge & Dock Company vs. Kiesejewski, 43 Sup. Ct. 418, will reveal that a cause of action is either maritime or it is not maritime. If it is maritime, then the general rules of the admiralty law apply. If it is not maritime, then the local law of the state may apply, whether it be a compensation law or some other law, but by the very nature of the exclusiveness of the admiralty jurisdiction of the federal court, there can be no such thing as a local law being applied to some characteristic of the admiralty jurisdiction.

The federal admiralty courts have sometimes found it expedient to enforce in an admiralty court a local statute with reference to the survival of a cause of action, the period of limitation and few other special statutes. It will be seen, however, from an examination of the cases that these local laws are enforced in an admiralty court. A state court is without power to apply any kind of a law to a matter of maritime cognizance. In this case, so far as the question to be decided is concerned, it is immaterial whether or not the compensation law could be applied to this cause of action on the ground that it is of a local nature, because it is a matter of maritime cognizance, and [fol. 216] the court below lacked inherent power to hear and to determine the cause. By adopting the Constitution of the United States, all admiralty jurisdiction was transferred to the federal courts; hence this cause of action being of a maritime nature, which is admitted by your Honors in your opinion, the jurisdiction is in the federal court; and if the Compensation Law is to apply, or if any other law is to apply, the remedy must be pursued in a federal court having jurisdiction of an admiralty cause of action.

Argument under Sixth Ground

The Statement, Authorities, and Remarks under the Sixth Proposition in Plaintiff in Error's Application for a Writ of Error are hereby adopted and asked to be considered by the court.

Conclusion

Your petition respectfully prays that this Motion for Rehearing be granted, that the judgments of the Court of Civil Appeals and of the District Court be reversed and rendered, and in the alternative, that the judgments be reversed and remanded for further proceedings, according to law.

The Defendants in Error are represented by Howth & O'Fiel, attorneys at law, Beaumont, Texas.

Respectfully submitted,

Morris & Barnes, Attorneys for Plaintiff in Error.

[File endorsement omitted.]

[fol. 217]

[Title omitted]

It is ordered by the court that the Motion for a Rehearing herein by the Plaintiff in Error be overruled, as recommended by the Commission of Appeals.

[fol. 218]

IN SUPREME COURT OF TEXAS

[Title omitted]

PETITION FOR AND ORDER ALLOWING WRIT OF ERROR—Filed June 4, 1924

To the Honorable C. M. Cureton, Chief Justice of the Supreme Court of Texas, and to the Associate Justices of the Court:

Millers Indemnity Underwriters, a mutual reciprocal insurance association, plaintiff in error in the above-entitled cause, respectfully shows that on the 23rd day of April, 1924, the Supreme Court of the State of Texas, which is the highest court in the State in which a decision in said cause could be had, rendered a judgment against your petitioner in a certain action in which Mrs. Nellie Boudreaux Braud (Mrs. E. J. Braud) et al. were plaintiffs (defendants in error here), and your petitioner, Millers Indemnity Underwriters, was defendant (plaintiff in error here), and that a petition for rehearing duly filed by petitioner was denied by the Court on May 21st, 1924. In said action a right, privilege, and immunity from liability was duly set up and claimed by your petitioner under the Constitution and statutes of the United States, and the decision of the Supreme Court of Texas

was against said right, privilege, and immunity, and in said action there was drawn in question the validity of a statute of said State of Texas, to-wit, the Workmen's Compensation Law of Texas, being Act 1917, 35th Legislature, ch. 103, arts. 5246-1 to 5246-96, Vernon's Sayles' Texas Civil and Criminal Statutes, 1918 Supplement, as ap [fol. 219] plied to a maritime or admiralty cause of action, on the ground that said statute of Texas was repugnant to the Constitution and laws of the United States, and the decision was in favor of the validity of said State statute; all of which fully appears in the records and proceedings of the case and is specifically set forth in the assignment of errors filed herewith.

The said Workmen's Compensation Law of Texas, among other things, organizes an Industrial Accident Board with exclusive jurisdiction to hear and determine disputes arising under the law with reference to claims for compensation arising under the law, providing for appeals to the Civil Courts of Texas, and providing who shall become subscribers thereunder, and providing an exclusive remedy by way of compensation measured by a percentage of the average weekly wage of an employe of a subscriber in the event of injury or death; and the employer of the deceased, O. O. Boudreux, was a subscriber under said law, and the beneficiaries of said O. O. Boudreux filed a claim for compensation on account of his death with the Industrial Accident Board of Texas, which claim your petitioner, Millers Indemnity Underwriters (plaintiff in error herein), the insurer under said law of the employer of the deceased, contested before said Board, and said Board entered an award denying compensation to defendants in error herein, from which order defendants in error herein appealed to the District Court of Orange County, Texas, whereupon trial de novo, as provided in said Act, said District Court of Texas entered a judgment awarding compensation under said law to Mrs. Nellie Boudreux Braud (Mrs. E. J. Braud), joined pro forma by her husband Ed J. Braud, defendants in error herein, and denying a recovery to all other claimants, and plaintiff in error herein appealed to the Court of Civil Appeals of Texas for the Ninth Judicial District of Texas, at Beaumont, which Court affirmed the judgment of the District Court of Orange County, Texas, and plaintiff in error applied [fol. 220] for and was granted a writ of error to the Supreme Court of Texas, the highest court of the State of Texas, to which said cause could be carried, and said Court has affirmed the actions of the District Court of Orange County, Texas, and said Court of Civil Appeals at Beaumont, Texas, as above set forth.

Wherefore, inasmuch as your petitioner feels aggrieved by the decision of the Supreme Court of Texas and a manifest error has occurred, greatly to the damage of said Millers Indemnity Underwriters, it respectfully prays that a Writ of Error may be issued from the Supreme Court of the United States to the Supreme Court of Texas for the correcting of the errors complained of; that an order may be entered fixing the amount of the supersedeas bond; that a duly authenticated transcript of the records of the proceedings herein in said Supreme Court of Texas be sent to the Supreme Court of the United States at Washington, D. C., under rules of said Court in

such cases made and provided; and that the decision and judgment of the Supreme Court of Texas herein may be reversed and annulled, as according to law and justice should be done.

Morris & Barnes, Attorneys for Millers Indemnity Underwriters.

Let the Writ of Error above prayed for issue upon the execution of the bond by the Millers Indemnity Underwriters in favor of Mrs. Nellie Boudreaux Braud (Mrs. E. J. Braud) and E. J. Braud (the defendants in error in whose favor the judgment was rendered), in the sum of Twelve Thousand Dollars, such bond, when approved, to act as a supersedeas.

[fol. 221] Dated this 4th day of June, 1924.

C. M. Cureton, Chief Justice of the Supreme Court of the State of Texas.

[File endorsement omitted.]

[fol. 222 & 223] BOND ON WRIT OF ERROR FOR \$12,000—Approved and filed June 7, 1924; omitted in printing

[fol. 224] IN SUPREME COURT OF TEXAS

WRIT OF ERROR—Filed June 4, 1924

UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Texas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Mrs. Nellie Boudreaux Braud (Mrs. E. J. Braud), and others, as defendants in error, and Millers Indemnity Underwriters, as plaintiff in error, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, [fol. 225] or laws of the United States, and the decision was in favor of their validity; a manifest error hath happened to the great damage of the said Millers Indemnity Underwriters, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given,

that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the 4th day of June, in the year of our Lord one thousand nine hundred and twenty-four.

F. T. Connerly, Clerk of the Supreme Court of Texas. (Seal of Supreme Court of the State of Texas.)

Allowed by C. M. Cureton, Chief Justice of the Supreme Court of Texas.

[File endorsement omitted.]

[fol. 226] CITATION—In usual form, showing service on M. G. Adams et al.; omitted in printing

[fol. 227] IN SUPREME COURT OF TEXAS
[Title omitted]

ASSIGNMENTS OF ERRORS AND PRAYER FOR REVERSAL—Filed June 4, 1924

Now comes Millers Indemnity Underwriters, the above named defendant (plaintiff in error) and files herewith its petition for a writ of error and says that there are errors in the record and proceedings of the above entitled cause, and, for the purpose of having same reviewed in the Supreme Court of the United States, makes the following assignment:

1. The Supreme Court of Texas erred in overruling and refusing to sustain plaintiff's first assignment of error in that Court, which was:

"The Court of Civil Appeals erred in refusing to sustain the appellant's First Proposition in its brief and assignments related thereto, said proposition being as follows:

"It appearing from the undisputed evidence that the deceased, O. O. Boudreux, at the time of his death was engaged in submarine diving in the waters of a public navigable stream, attempting to clear the waters of said stream of an obstruction to navigation be-

neath the waters of said stream, and working from and attached to a barge floating upon the waters of said stream about thirty-five feet from shore, and that he was working from and attached to said barge by a life line and air hose being his only connection with the outside world, the cause of action for his death while so engaged is of an admiralty and maritime nature, and exclusively cognizable in a court of admiralty by virtue of article 3, Section 2, of the Constitution of the United States.'"

2. The Supreme Court of Texas erred in overruling and refusing to sustain plaintiff's second assignment of error in that Court, which was:

"The Court of Civil Appeals erred in refusing to sustain the appellant's Second Proposition in its brief and assignments related thereto, said proposition being as follows:

"It appearing from the undisputed evidence that this cause was [fol. 228] of an admiralty and maritime nature, the action of the district court of Orange County, Texas, in entering judgment against appellant under the Workmen's Compensation Law of Texas, was an erroneous exercise of authority under a Statute of the State of Texas, in violation of Article 3, Section 2 of the Constitution of the United States, which article and section place the jurisdiction of admiralty and maritime cases exclusively in the Courts of the United States.'"

3. The Supreme Court of Texas erred in overruling and refusing to sustain plaintiff's third assignment of error in that Court, which was:

"The Court of Civil Appeals erred in refusing to sustain the Appellant's Third Proposition in its brief and assignments related thereto, said proposition being as follows:

"It appearing from the undisputed evidence that the cause was of an admiralty and maritime nature, the action of the Court in entering judgment against appellant was an erroneous holding that appellee had a right of action under the Workmen's Compensation Law of Texas against appellant in addition to the remedies given appellees by admiralty jurisdiction, and was an exercise of an authority under said Workmen's Compensation Law of Texas in violation of the Fourteenth Amendment to the Constitution of the United States, in that it denies to appellant the equal protection of the law, because said compensation law does not afford an exclusive remedy, but leaves the employer and his property subject to a suit in admiralty, and the insurer under the compensation law of Texas liable to pay such judgment, subjecting it to double damages.'"

4. The Supreme Court of Texas erred in overruling and refusing to sustain plaintiff's fourth assignment of error in that Court, which was:

"The Court of Civil Appeals erred in refusing to sustain the Appellant's Fourth Proposition in its brief and assignments related thereto, said proposition being as follows:

"The Workmen's Compensation Law of Texas is invalid under the Constitution of the United States in so far as it applies to admiralty and maritime causes, and the undisputed evidence showing this to be a cause of admiralty and maritime nature, this cause should have been dismissed for want of jurisdiction."

5. The Supreme Court of Texas erred in overruling and refusing to sustain plaintiff's fifth assignment of error in that Court, which was:

"The Court of Civil Appeals erred in refusing to sustain the Appellant's Fifth Proposition in its brief and assignments related thereto, said proposition being as follows:

"It appearing from the undisputed evidence that this is a cause of an admiralty and maritime nature, the action of the court in rendering judgment against Appellant under the Workmen's Compensation Law of Texas, is in violation of the Fourteenth Amendment to the Constitution of the United States, because it deprives the appellant of its property without due process of law."

For which errors and other manifest errors appearing in the record, the defendant Millers Indemnity Underwriters (plaintiff in error) prays that the said judgment of the Supreme Court of Texas in this cause, dated April 23, 1924, and its order therein of May 21, 1924, be reversed and a judgment rendered in favor of said defendant, and for costs.

Morris & Barnes, Attorneys for Miller Indemnity Underwriters, Plaintiff in Error.

[File endorsement omitted.]

[fol. 230]

IN SUPREME COURT OF TEXAS

[Title omitted]

PRÆCIPICE FOR TRANSCRIPT OF RECORD—Filed June 7, 1924

To the Clerk of the Supreme Court of Texas:

Now comes Millers' Indemnity Underwriters, Plaintiff in Error, by counsel, and respectfully requests that you make up a transcript of the record in this cause to be forwarded to the Supreme Court of the United States pursuant to Writ of Error from that Court to the Supreme Court of Texas, in accordance with Rule 8 of the Rules

of the Supreme Court of the United States, to consist of the following instruments, to wit:

1. Caption (Tr. p. 1).
2. Plaintiff's First Amended Original Petition and Exhibit A (Tr. p. 5, et seq.).
3. Defendant's First Amended Original Answer (Tr. p. 11 et seq.).
4. Defendant's Motion to Dismiss for want of jurisdiction (Tr. p. 15).
5. Defendant's request for a peremptory instruction (Tr. p. 24).
6. Defendant's exceptions to Court's charge, beginning with style of case through and including paragraph (h) tr. p. 20, and beginning with "Respectfully submitted" on page 22 to bottom of page 22.
- [fol. 231] 7. Court's charge to jury (Tr. p. 23).
8. Jury's Verdict (Tr. p. 24).
9. Judgment (Tr. pp. 25-26).
10. Defendant's Bill of Exception No. 1, Tr. p. 26, beginning with Style of Case through and including paragraph (f) page 28. Skip paragraphs (g), (h), (i), (j), (k), and (l), and copy all of conclusion to page 29.
11. Defendant's Bill of Exception No. 2, Tr. p. 29, beginning with Style of Case, through paragraph (e) page 30, beginning again at paragraph (h) page 30, and copying rest of bill to page 31.
12. Defendant's Motion for a New Trial, Tr. p. 51, from beginning through paragraph (f) page 56, and beginning on page 57, paragraph X, through paragraph (f) page 58, and beginning on page 61, paragraph XXI, through paragraph (h) page 62, and beginning on page 62 copy paragraph (g), and copy conclusion beginning page 72 to end on page 72.
13. Order Overruling Motion for a New Trial (Tr. p. 73).
14. Supersedeas Bond (Tr. pp. 73-76).
15. Title page of transcript showing its filing in court of Civil Appeals and Supreme Court.
16. Title page Appellant's brief, Court of Civil Appeals, showing file marks.
17. Appellant's Brief page 65, copy assignments of error page 65 to (g) page 72, and beginning page 73 to (g) page 75, and beginning page 81 to (e) page 81; and
Statement of Nature of Case and first six propositions, page 1 to bottom of page 7; and

Brief of the Argument, argument under propositions 1 to 6, inclusive, brief pp. 15 to 25; and

Page 42, Argument under Seventeenth Proposition; and Conclusion, page 63.

[fol. 232] 18. Judgment and Opinion Court of Civil Appeals.

19. Appellant's Motion for Rehearing in Court of Civil Appeals, starting top of first page, through Sixth Ground page 3, and beginning on page 10, Brief of Argument, Argument under Propositions 1-6, inclusive, pages 10 to 12 thereof; and

Conclusion, page 15.

20. Order of Court of Civil Appeals overruling Appellant's Motion for Rehearing.

21. Petition for Writ of Error, title page showing filing in Court of Civil Appeals; and

Back page, showing filing in Supreme Court of Texas; and

Beginning at top of front page to Second Ground, page 6; and Page 9 from top of page to Seventh page 11; and

Brief of the Argument ,page 12, Argument under Propositions 1 to 5 inclusive, Statement, Authorities, and Remarks, through page 24; and

Conclusion, pages 39-40.

22. Order Granting Writ of Error by Supreme Court of Texas.

23. Order referring case to Commission of Appeals.

24. Opinion and Judgment of Commission of Appeals, and approval by Supreme Court of Texas.

25. Motion for Rehearing in Supreme Court by Plaintiff in Error, back page showing filing in Supreme Court of Texas, and reference to Commission of Appeals; and

Beginning top of first page to bottom page 4; and

Brief of the Argument, Argument under propositions 1-6 inclusive, page 7 to bottom page 10; and

Conclusion, page 12.

26. Order overruling Plaintiff in Error's Motion for Rehearing.

27. Petition for Writ of Error to Supreme Court of United States, [fol. 233] with accompanying assignments of Error.

28. Order allowing writ of error to Supreme Court of United States.

29. Writ of Error to Supreme Court of United States.

30. Citation on Writ of Error to Supreme Court of United States, showing waiver of service.

31. The Writ of Error Bond to the Supreme Court of the United States, being a supersedeas Bond.
32. This Præcipe, showing waiver of notice and service thereon.
33. Certificate of Clerk of the Supreme Court of Texas authenticating transcript.

Yours very truly,

Morris & Barnes, Attorneys for Millers' Indemnity Underwriters, Plaintiff in Error.

Service of notice and copy of this præcipe is hereby waived. All other rights and objections reserved, this 5th day of June, 1924.

Mrs. Nellie Boudreaux Braud (Mrs. E. J. Braud) and Ed J. Braud, Defendants in Error, by Howth & O'Fiel, M. G. Adams, Their Attorneys of Record.

[File endorsement omitted.]

Beaumont, Texas, June 13, 1924.

Mr. F. T. Connerly, Clerk Supreme Court, Austin, Texas.

DEAR SIR:

Re Millers' Indemnity Underwriters vs. E. J. Boudreaux et al., No. —

From the præcipe prepared by the appellant in the above cause we cannot determine whether or not it calls for all the facts of the case involved in the admiralty question; and, inasmuch as it is necessary that all of the facts bearing on this question should go before the Supreme Court of the United States in order that said court might pass intelligently upon whether or not a Writ of Error should be granted, we believe that the only safe plan will be to send up as a part of the record the whole Statement of Facts; and especially so, because practically all of the facts relate to the admiralty issue either directly or indirectly.

Wherefore, we request that the whole Statement of Facts be incorporated into the record to be sent up to the Supreme Court of the United States in this case.

Very sincerely,

Howth, Adams, O'Fiel & Hart, by M. G. Adams.

[File endorsement omitted.]

[fol. 234]

IN SUPREME COURT OF TEXAS

[Title omitted]

CLERK'S CERTIFICATE

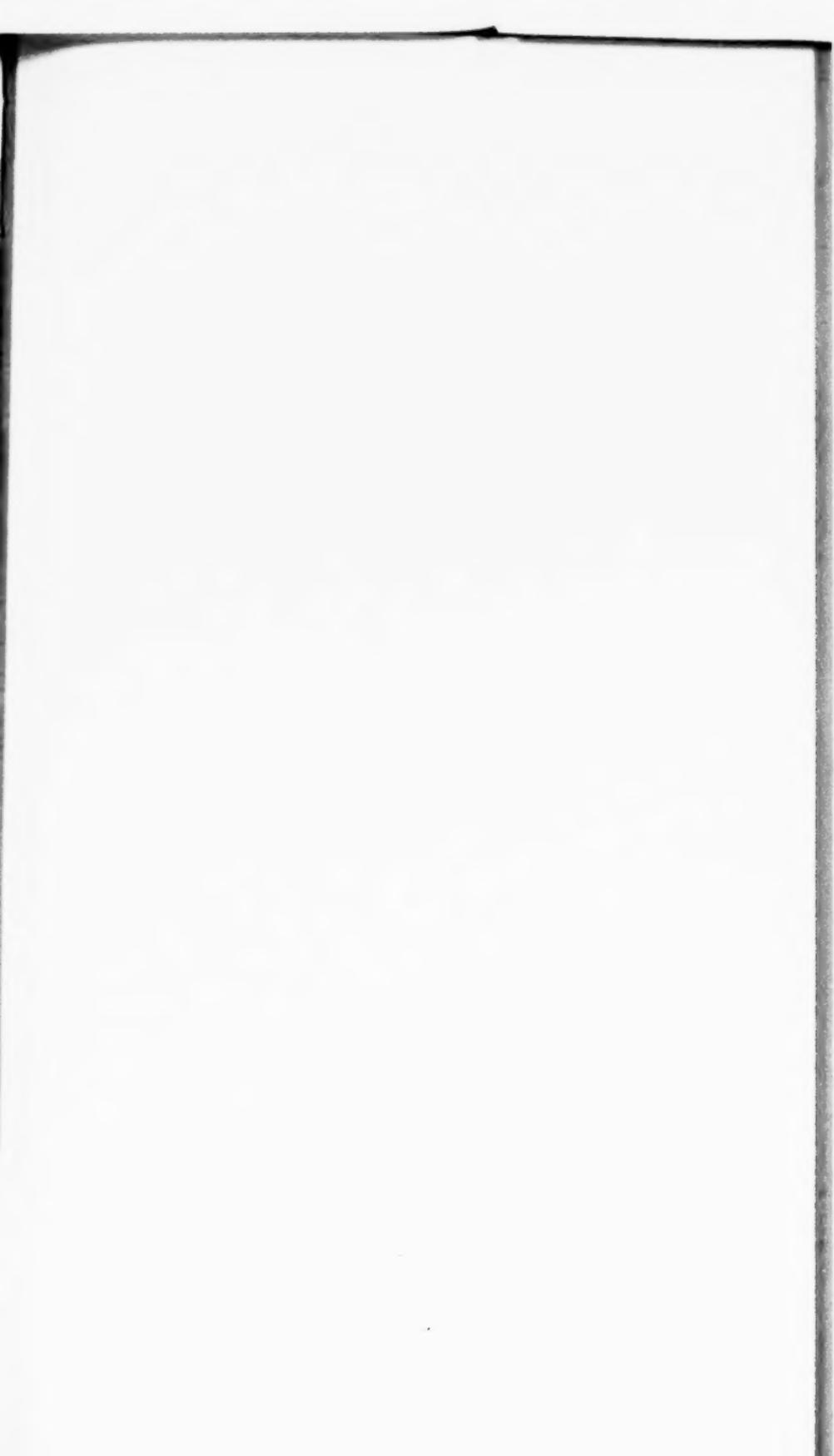
I, F. T. Connerly, Clerk of the Supreme Court of Texas, hereby certify that the foregoing 233 pages contain a true and correct copy of the parts of the transcript of record and of the other papers and documents on file in this office as called for by the praecipe as filed in this office by counsel for plaintiff in error (as well as the praecipe for the defendants in error) in cause No. 3935, styled Millers' Indemnity Underwriters, plaintiff in Error, vs. E. J. Boudreaux et al. (Nellie Boudreaux Braud), defendants in Error, as the same appear on file and of record in this office, with the exception of the Writ of Error, Citation, and Assignment of Error herewith attached at pages 224-5, 226, and 227-9, respectively, which are not copies but the original Writ, Assignments, and Citation, copies of which are lodged in this office.

Witness my hand and the official seal of said Court at the City of Austin, Texas, this the 26th day of June, A. D., 1924.

F. T. Connerly, Clerk of the Supreme Court of Texas. (Seal of Supreme Court of the State of Texas.)

Endorsed on cover: File No. 30,467. Texas Supreme Court. Term No. 502. Millers Indemnity Underwriters, plaintiff in error, vs. Mrs. Nellie Boudreaux Braud (Mrs. E. J. Braud) and Ed. J. Braud. Filed July 3, 1924. File No. 30,467.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [REDACTED] 1925.

No. [REDACTED] 124

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MILLERS INDEMNITY UNDERWRITERS, PLAINTIFF
IN ERROR, PETITIONER,

vs.

NELLIE BOUDREAUX BRAUD (MRS. E. J. BRAUD),
DEFENDANT IN ERROR, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF TEXAS
AND BRIEF IN SUPPORT THEREOF.

G. BOWDOIN CRAIGHILL,
HANNIS TAYLOR, JR.,

*Attorneys for Millers Indemnity
Underwriters, Petitioner.*

J. B. MORRIS,
J. AUSTIN BARNES,

Of Counsel.



SUPREME COURT OF THE UNITED STATES.
OCTOBER TERM, 1924.

No. 502.

MILLERS INDEMNITY UNDERWRITERS, PLAINTIFF
IN ERROR, PETITIONER,

vs.

NELLIE BOUDREAUX BRAUD (MRS. E. J. BRAUD),
DEFENDANT IN ERROR, RESPONDENT.

**PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF TEXAS
AND BRIEF IN SUPPORT THEREOF.**

Your petitioner, Millers Indemnity Underwriters, a mutual reciprocal insurance association, respectfully prays for a writ of certiorari to review the judgment of the Supreme Court of the State of Texas entered in the above cause on April 23, 1924. A petition for rehearing was considered by the Supreme Court of Texas and denied on May 21, 1924.

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Case Already Pending in This Court on Writ of Error.

This case has already been docketed by petitioner in this Court upon a writ of error allowed by the Supreme Court of Texas and petitioner has filed with the Clerk a certified transcript of the record showing the proceedings had in the Supreme Court of Texas, in the Court of Civil Appeals of Texas, and in the District Court of Orange County, Texas, such record including the opinion of the Supreme Court of Texas. A supersedeas bond has been approved by the Chief Justice of the Supreme Court of Texas and duly filed.

Petitioner believes that this case is already properly before this Court on writ of error, but, to guard against the possibility of this Court deciding otherwise, petitioner also applies for a writ of certiorari under Section 237 of the Judicial Code, as it is apparent from the record that petitioner in this case claimed a right, privilege, or immunity from liability under the Constitution and statutes of the United States and the decision of the Texas Supreme Court was adverse to the privilege, right, or immunity so claimed.

Federal Question Involved.

As more fully set forth in the assignment of errors, petitioner contends that, upon the undisputed evidence, this case is based upon an alleged *maritime tort*, which is cognizable exclusively in a court of admiralty under Article 3, Section 2, of the Constitution of the United States; that the Texas courts had no jurisdiction of this cause under the Texas Workmen's Compensation Law or otherwise; that the Texas Workmen's Compensation law is invalid under the Constitution of the United States in so far as an attempt is made

to apply it to this admiralty or maritime cause of action, and in rendering judgment against petitioner under such law the Texas courts violated the Fourteenth Amendment, as well as Article 3, Section 2, of the Constitution of the United States.

Proceedings in Lower Courts.

This suit was instituted on December 10, 1920, in the District Court of Orange County, Texas, by E. J. Boudreaux, R. J. Boudreaux, Mary M. Boudreaux, and Nellie Boudreaux Braud (the respondent, who is sometimes described as "Mrs. E. J. Braud"), joined *pro forma* by her husband, E. J. Braud, against Millers Indemnity Underwriters (the petitioner) to set aside an award of the Industrial Accident Board of Texas, which had been in favor of petitioner, and to seek compensation for the death of O. O. Boudreaux under the Workmen's Compensation Law of Texas. The original plaintiffs alleged that they were the surviving brothers and sisters of deceased, but at the trial all of the plaintiffs were dismissed from the suit except the respondent, Mrs. E. J. Braud, and her husband, in whose favor judgment was rendered against petitioner for the sum of \$5,400, a part thereof being payable at the rate of \$15 per week for 268 weeks, under the Compensation Law. The suit was filed against petitioner under certain provisions of the Workmen's Compensation Law of Texas, plaintiffs alleging that petitioner insured decedent's employer, National Shipbuilding Company, against liability to pay compensation in cases coming within the purview of such Compensation Law.

On appeal to the Court of Civil Appeals of Texas, the judgment was affirmed, and later affirmed by the Supreme Court of Texas.

Federal Question Was Properly Raised and Preserved.

Petitioner denied all liability when claim was made by respondent before the Industrial Accident Board. Upon institution of the suit in the District Court of Orange County, Texas, your petitioner filed a plea to the jurisdiction of the Court and a general demurrer on the ground that the issues arising from the facts alleged were exclusively cognizable in a court of admiralty jurisdiction, and that the Workmen's Compensation Law of Texas was not applicable for the reasons above set forth.

At the close of the evidence and before the case was given to the jury your petitioner moved the Court to dismiss the cause for want of jurisdiction upon the same grounds.

In the trial court, a motion was also filed to set aside the verdict and judgment for similar reasons.

The same contentions were made in the Court of Civil Appeals of Texas and in the Supreme Court of Texas, as shown by the assignments of errors filed in such courts.

Short Statement of Facts.

O. O. Boudreaux was employed by the National Shipbuilding Company as a diver, and on April 17, 1920, was working in the waters of the Sabine River, a navigable stream between Texas and Louisiana. In the full equipment of a diver, he went to the bottom of the river from a floating barge, which was about thirty-five feet from and not connected with the shore, to remove an obstruction to navigation, namely, a part of a set of ways which had formerly been used for launching ships. There was some testimony to the effect

that a portion of the ways was being removed in order to make room for the extension of a wharf.

The life line and air hose attached to the floating barge constituted Boudreax's only connection with the outside world, and, while so engaged, the plaintiffs alleged and evidence was offered tending to prove that in some manner the supply of air became fouled or was cut off, so that he died of suffocation.

Upon such facts, the Texas courts permitted a recovery by respondent, decedent's sister, who the jury decided was partly dependent upon decedent for support, under the Workmen's Compensation Law of Texas.

Provisions of Workmen's Compensation Law of Texas.

The Texas courts took judicial notice of, and in this case the Supreme Court of the United States will, of course, take judicial notice of, the provisions of the Workmen's Compensation Law of Texas, which will be quoted in petitioner's brief on the merits.

Speaking generally, the Texas law, known as the Act of March 28, 1917, chapter 103, and also Articles 5246-1 to 5246-91 of Vernon's Sayles' Texas Civil and Criminal Statutes, 1918 Supplement, undertakes, in certain master and servant cases, to abolish the common-law defenses of contributory negligence, fellow-servant, and assumed risks, but creates an "Industrial Accident Board," which is given exclusive power to administer the law, which provides for compensation, in accordance with schedules therein prescribed, for injuries to and death of employees, irrespective of any negligence on the part of the employer.

The law also creates the "Texas Employers' Insurance

Association," to which any employer of labor in the State may become a subscriber, but the employer is given an option to insure his liability to pay compensation by taking out a policy with an insurance company, "which term shall include mutual and reciprocal companies." (As above stated, petitioner is a mutual reciprocal insurance association.) Employers who subscribe to the association or take out insurance cannot be sued for damages by injured employees, but such employees must look for compensation solely to the association or insurance company.

The law also provides that any interested party who is not willing to abide by any final decision of the Industrial Accident Board may file suit "in some court of competent jurisdiction in the county where the injury occurred to set aside" the award of the Board.

In the present case, the Board denied the application of Mrs. Braud for compensation, whereupon she, with the other original plaintiffs, filed suit to set aside the Board's ruling and to recover compensation under the law. As above stated, Mrs. Braud succeeded in obtaining a judgment for the compensation provided for by the Workmen's Compensation Law.

Authorities.

The opinion and judgment of the Supreme Court of Texas, affirming the judgment in favor of Mrs. Braud for compensation under the Texas law, are directly contrary to the decisions of the Supreme Court of the United States in the cases of:

Southern Pacific Co. *v.* Jensen, 244 U. S., 205;
Knickerbocker Ice Co. *v.* Stewart, 253 U. S., 149;

State of Washington *v.* Dawson & Co., 264 U. S., —
(decided Feb. 25, 1924);

Panama R. R. Co. *v.* Johnson, 264 U. S., — (decided
April 7, 1924),

and other cases, which will hereafter be reviewed in petitioner's main brief upon the merits.

Wherefore your petitioner respectfully prays that a writ of certiorari may be issued by this Court, directed to the Supreme Court of the State of Texas, and that the judgment of said Supreme Court of Texas in this case be reversed by this Honorable Court.

If this petition is granted, petitioner further prays that the certified copy of the record already on file in this Court upon the writ of error may be treated as a return to the writ of certiorari.

Respectfully submitted,

G. BOWDOIN CRAIGHILL,
HANNIS TAYLOR, JR.,

Attorneys for Millers Indemnity

Underwriters, Petitioner.

J. B. MORRIS,

J. AUSTIN BARNES,

Of Counsel.

To Messrs. HOWTH & O'FIEL and M. G. ADAMS,
Attorneys for Respondent,
Beaumont, Texas:

Please take notice that the petitioner will submit the foregoing petition for certiorari and a copy of the whole record in the case to the Supreme Court of the United States, at Washington, D. C., upon the convening of the Court on Monday, October 6, 1924, or as soon thereafter as counsel can be heard, a copy of the petition being delivered to you here-with.

G. BOWDOIN CRAIGHILL,
HANNIS TAYLOR, JR.,
*Attorneys for Millers Indemnity
Underwriters, Petitioner.*

Service of the foregoing notice, together with a copy of the petition for writ of certiorari, is hereby acknowledged this — day of —, 1924.

HOWTH & O'FIEL AND
M. G. ADAMS,
Attorneys for Respondent.





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WM. R. STANSBURY
CLERK

SUPREME COURT OF THE UNITED STATES.
OCTOBER TERM, 1925.

No. 124

MILLERS INDEMNITY UNDERWRITERS,
PLAINTIFFS IN ERROR,

vs.

Mrs. NELLIE BOUDREAUX BRAUD (MRS.
E. J. BRAUD), DEFENDANT IN ERROR.

BRIEF FOR PLAINTIFFS IN ERROR.

G. Bowdoin CRAIGHILL,
HANNIS TAYLOR, JR.,
J. AUSTIN BARNES,
Attorneys for Plaintiffs in Error.

J. B. MORRIS,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1925.

No. 124

MILLERS INDEMNITY UNDERWRITERS,
PLAINTIFFS IN ERROR,

vs.

NELLIE BOUDREAUX BRAUD (MRS. E. J.
BRAUD), DEFENDANT IN ERROR.

BRIEF FOR PLAINTIFFS IN ERROR.

Statement.

FEDERAL QUESTION INVOLVED.

This is a writ of error granted by the Supreme Court of Texas to review its judgment and decision overruling the contention, which was urged by plaintiffs in error in the trial court as well as the appellate courts of Texas, that upon the undisputed evidence this case is based upon an alleged *maritime tort* which is cognizable exclusively in a

court of admiralty under Article 3, Section 2, of the Constitution of the United States, and that the State courts of Texas had no jurisdiction of this cause under the Texas Workmen's Compensation Law, or otherwise; and further that the Texas Workmen's Compensation Law is invalid under the Constitution of the United States in so far as an attempt is made to apply it to this admiralty or maritime cause of action, and in rendering judgment against plaintiffs in error under such law the Texas courts violated the Fourteenth Amendment, as well as Article 3, Section 2, of the Constitution of the United States.

Facts.

The facts are, briefly, that on April 17, 1920, O. O. Boudreaux and his fellow-workmen were working for the National Shipbuilding Company near Orange, Texas, on and from a boat or barge about twelve feet wide and eighteen feet long, with an eight-by-ten cabin on it, on which barge were carried and transported equipment, tools, appliances, and material for submarine diving operations. The barge had no means of self-propulsion, but was towed about from place to place on the waters where work was to be performed. On the occasion in question, O. O. Boudreaux and the other members of the crew on said boat were engaged in removing an obstruction to navigation, to wit, an abandoned set of ways from the bed of the Sabine River, a navigable stream forming the

boundary line between the States of Louisiana and Texas.

His foreman in charge of the work, L. J. Kerr, testified:

"I was in charge of the work Mr. Boudreux was doing. He was a diver. * * * As to the nature of the work he was doing, it was a set of ways that was formerly used for launching ships and the National Shipbuilding Company decided to do away with that set of ways, or part of it, a hundred feet of it, in order to extend the wharf, and we were dismantling and cutting out those ways. There was no boat on those ways, the last one had been launched on that set of ways. We were dismantling them in order to extend the wharf so as to dismantle some boats the National Shipbuilding Company had bought. Yes, sir, we were taking those out to get the boats in. Yes, sir, that was an obstruction to navigation, and we were taking the obstruction away" (Record, pp. 56-57).

The barge from which Boudreux was working had been towed out from shore into the river about thirty-five feet, and Boudreux had donned the full equipment of a diver and had submerged himself from the barge to the bed of the river, taking with him a cross-cut saw to remove the timbers from the bed of the river. The other members of the boat's crew were pumpers and a tender, the pumpers working the air pumps to force air down to the diver's suit, while the tender held the life line con-

nected to the diver, by means of which signals were given and communication had with the diver. The only connection the diver had with the outside world was his life line and air hose, which were connected with the barge. The barge was not attached to or connected with the bank of the river in any way, but was held by its anchor and was floating on the waters of the river. While so engaged, the plaintiff alleged, and evidence was offered tending to prove, that in some manner the supply of air became fouled or was cut off from the said O. O. Boudreaux so that he died of suffocation.

Upon such state of facts, the Industrial Accident Board of Texas denied a recovery, but the Texas courts permitted a recovery by respondent, decedent's married sister, who, the jury decided, was partly dependent upon decedent for support, under the Workmen's Compensation Law of Texas.

Texas Compensation Law.

The Texas Compensation Law, known as the Act of March 28, 1917, Chapter 103, also found in Articles 5236-1 to 5246-91 Vernon's Sayles' Texas Civil and Criminal Statutes, 1918 Supplement, is substantially copied from the Workmen's Compensation Law of Massachusetts, and substitutes for the common-law rules of substantive and adjective law in master and servant cases, with few exceptions not material here, an Industrial Accident

Board to adjudicate and a schedule of weekly payments to compensate injured industrial employees and the beneficiaries of deceased employees. Section 3, Part I of the Act provides:

SEC. 3. The employees of a subscriber shall have no right of action against their employer for damages for personal injuries, and the representatives and beneficiaries of deceased employees shall have no right of action against such subscribing employer for damages for injuries resulting in death, but such employees and their representatives and beneficiaries shall look for compensation solely to the association as the same is hereinafter provided for: *Provided*, that all compensation allowed under the succeeding sections herein shall be exempt from garnishment, attachment, judgment and all other suits or claims, and no such right of action and no such compensation and no part thereof or of either shall be assignable, except as otherwise herein provided, and any attempt to assign the same shall be void."

The employees of a subscriber do not contribute to the fund provided for their protection, nor are they parties to the arrangement except by operation of the law which deprives them of all their common law rights. The employer simply takes out a policy of insurance on his employees, the policy providing that the insurance company will pay the compensation prescribed by law. The remedy is independent of agreement. The National

Shipbuilding Company, the employer of decedent, was a subscriber under the above-mentioned law, and the plaintiff in error was the compensation insurance carrier.

Decision of Supreme Court of Texas.

The Supreme Court of Texas, in deciding this case, said (Rec. 121-123) :

"The cause of action here is not predicated primarily upon a tort, on the contrary it grows directly out of the contract of employment between the parties, upon the theory that the compensation law of the State is read into and becomes a substantial part of this contract. The element of wrongdoing does not enter into the question of compensation. It follows, therefore, that the present case must be tested by the principle applicable to contract matters; and the question of admiralty jurisdiction must be determined by the subject-matter of the contract—the nature and character of the work being done. *Grant-Smith Porter Ship Company v. Rhode* (257 U. S., 469)."

* * * * *

"At the most the contract under consideration here did not go beyond what has been termed "maritime and local in character." As an illustration of what is meant by such a contract we call attention to the case of *Grant Smith-Porter Ship Co. v. Rhode*, *supta*.

* * * * *

"This rule of giving application to the State compensation laws in cases which are maritime but local in character has recently been applied in several cases; and if it be conceded that the employment here partakes somewhat of a maritime nature, yet if the general employment contracted for and the work being done did not have a direct relation to navigation or maritime commerce, then the State court had jurisdiction and the compensation law was applicable. *State Ind. Com. v. Nordenholz Corp.*, 259 U. S., 263."

Federal Question Was Properly Raised and Preserved.

Plaintiff in error denied all liability when claim was made by defendant in error before the Industrial Accident Board, which decided in favor of plaintiff in error (Rec. 4). Upon institution of the suit in the District Court of Orange County, Texas, plaintiff in error filed a plea to the jurisdiction of the Court and a general demurrer on the ground that the issues arising from the facts alleged were exclusively cognizable in a court of admiralty jurisdiction, and that the Workmen's Compensation Law of Texas was not applicable for the reasons above set forth (Rec. 5-6).

At the close of the evidence and before the case was given to the jury plaintiff in error moved the Court to dismiss the cause for want of jurisdiction upon the same grounds (Rec. 7).

In the trial court, a motion was also filed to set aside the verdict and judgment for similar reasons.

The same contentions were made in the Court of Civil Appeals of Texas and in the Supreme Court of Texas, as shown by the assignments of errors filed in such courts (Rec. 71-76; 105-107).

Specification of Error.

As more fully set forth in the assignments of errors (Record, pp. 134-136), the Supreme Court of Texas erred in holding that the District Court of Orange County, Texas, had jurisdiction of this cause.

ARGUMENT.

Texas Courts Did Not Have Jurisdiction.

The plaintiff in error contends that the State District Court of Texas did not have jurisdiction of this cause, and urges in support of its contention:

Under the facts of this case, the cause of action was that of a maritime tort, cognizable in admiralty and over which the State courts of Texas had no jurisdiction either under the Workmen's Compensation Law or otherwise.

The Supreme Court of Texas bases its decision upon what counsel believes to be an erroneous construction of the opinion of the United States Supreme Court in the case of *Grant-Smith Porter Ship Company vs. Rhode*, 257 U. S., 469. While

conceding that this cause of action, if considered as a tort action, partakes of an admiralty nature, yet the court concludes from the above opinion that the *State court* may assume jurisdiction of an admiralty cause of action and apply to it local statutes as long as such statutes do not work material prejudice to the general characteristics of the maritime law. The opinion in *Grant-Smith Porter vs. Rhode* did not so hold, as is plainly shown in the later case of *The State of Washington vs. W. C. Dawson & Co.*, 264 U. S., 219, and the case of *Frank Gonsalves vs. Morse Dry Dock & Repair Co.*, 266 U. S., 171. The Supreme Court of the United States has never held that a *State court* may assume jurisdiction over causes of an admiralty nature. What it has held, if counsel properly construes its opinions, is that a *court of admiralty*, under certain circumstances, may apply to an admiralty cause of action local regulations.

If this case could be disposed of upon the theory that the cause of action grows out of the contract of employment, there would be no basis for the decision of the Supreme Court of the United States in *Southern Pacific Company vs. Jensen*, 244 U. S., 205. The primary cause, which is, after all, the basis of the cause of action in this cause, is the death of the diver, O. O. Boudreux, which death was occasioned by a tort committed upon navigable water while the deceased was engaged in work of a maritime nature. The reason the compensation law cannot apply to a cause of an admiralty nature is

and apply to such causes
a State Statute
a Compensation Law.

that the admiralty law is an exclusive branch of Federal jurisprudence which covers maritime torts. Now, if we could say that the cause of action under a Workmen's Compensation Act which is occasioned by a maritime tort is based upon the contract of employment into which there is read the compensation law, then there would be no basis for any of the decisions of the Supreme Court of the United States holding that the compensation law of the different States cannot supersede the admiralty jurisdiction of the Federal courts. As we said before, the body of admiralty laws is a distinct branch of jurisprudence. The Constitution of the United States gave that branch of jurisprudence to the Federal courts. The rights and remedies under the admiralty law are defined by the ancient customs and usages relating to matters pertaining to the sea. The compensation law of the State seeks to substitute for those ancient customs and usages an altogether different scheme of recovery, as well as an entirely different body of laws. The compensation law cannot substitute its measure of damages, if you can call it a measure of damages, for the right of maintenance and cure given to an injured person by the rules of admiralty. No matter whether you consider the cause of action as predicated upon the contract of employment or whether you consider it as predicated upon the tort, if the tort occurred upon navigable waters, the locality of the tort fixes the jurisdiction.

The Legislature of a State cannot do indirectly

that which it is not permitted to do directly by virtue of the admiralty clause of the Constitution of the United States; neither can the State courts, by construction infringe upon the Federal jurisdiction in admiralty. If we could say that this cause of action is predicated upon the contract of employment, which is governed by the Workmen's Compensation Act, then in every cause of an admiralty nature the court could say that the cause of action is not predicated primarily upon a tort, and in that manner the jurisdiction of the Federal courts in admiralty would be entirely defeated, by doing indirectly what could not be done directly. It is a well-settled principle that the Legislature of Texas cannot make a rule of law governing the rights and liabilities covered by the admiralty law. Since the Legislature cannot do that directly, it certainly has no power to pass a compensation law based upon the contract of employment between the parties which would supersede the ancient customs and usages of admiralty. The compensation law provides an exclusive remedy. It provides that when a person is injured who is covered by this compensation law he must take the compensation provided by the law, and the law furnishes his exclusive remedy. He cannot sue his employer as at common law; neither can he sue in admiralty or elsewhere. It is readily seen, therefore, that if this scheme of compensation should be applied to matters of admiralty, there would be as many different schemes of compensation within the United States

as there are States. It would destroy that uniformity provided by the admiralty law, which is so essential to the general application of the admiralty laws to maritime matters.

The Federal admiralty courts have sometimes found it expedient to enforce *in an admiralty court* a local statute with reference to the survival of a cause of action, the period of limitation, and few other special statutes. It will be seen, however, from an examination of the cases that these local laws are enforced in an admiralty court. A State court is without power to apply any kind of a law to a matter of maritime cognizance. In this case, so far as the question to be decided is concerned, it is immaterial whether or not the compensation law could be applied to this cause of action on the ground that it is of a local nature, because it is a matter of maritime cognizance, and the court below lacked inherent power to hear and to determine the cause.

Provisions of Federal Constitution and Statutes.

Article III, Section 2, of the Constitution of the United States provides that "The judicial power shall extend * * * to all cases of admiralty and maritime jurisdiction."

The provisions of Section 9 of the Judiciary Act of 1789 (1 Stat., 76), granting to the United States District Courts "*exclusive* original cognizance of all civil causes of an admiralty and maritime juris-

diction * * * saving to suitors, in all cases, the right of a common-law remedy where the common law is competent to give it," was carried into the Revised Statutes, Sections 563 and 711, and thence into the Judicial Code, Sections 24 and 256.

By adopting the Constitution of the United States, all admiralty jurisdiction was transferred to the Federal courts; hence this cause of action, being of a maritime nature, which is admitted in the opinion of the Supreme Court of Texas, the jurisdiction is in the Federal court; and if the compensation law is to apply, or if any other law is to apply, the remedy must be pursued in a Federal court having jurisdiction of an admiralty cause of action.

This case is further distinguished from the *Grant-Smith Porter* case in that in the *Grant-Smith Porter* case the employee and employer both contributed to the compensation fund, both became parties to the contract, while in the present case Boudreaux contributed nothing to the fund nor were he or his beneficiaries parties in any sense to the policy of compensation insurance carried by the employer who became a subscriber under the law and paid all the premiums for the protection the law afforded him. This insurance policy covered only the liability imposed by the law, and as the law is invalid as applied to causes of an admiralty nature, such accidents are not covered by the policy.

The courts of Texas have held the Texas compensation law invalid as applied to causes of an

admiralty nature. See *Home Life and Accident Company vs. Wade*, 236 S. W., 778, where it is held that:

“An employee injured while on a derrick barge in the Sabine river, assisting in loading cranes, is not entitled to compensation under the Workmen’s Compensation Act (Vernon’s Sayles’ Ann. Civ. St. 1914, arts. 5246h-5246nn); his cause of action, if any, being within the admiralty jurisdiction of the Federal courts.”

The accident was not caused by the contract of employment at all, nor did the contract of employment have anything to do with the cause of the accident. The basis of the cause of action is the death of Boudreux caused by suffocation, a tort, not a contract, occurring and effective upon navigable waters, and the place where the tort was committed determines the jurisdiction.

While Boudreux was not actually on the boat at the time the tort was committed, yet he was attached to and working from the boat and engaged in submarine diving operations in a navigable stream, removing from such stream an obstruction to navigation. At the time of his death he was engaged in a maritime employment.

This cause of action is a maritime tort within the meaning of this court when it stated in *Atlantic Transport Company vs. Imbrokek*, 234 U. S., 52:

“To constitute a maritime tort, it is not indispensable that there must be either an

injury to a boat, or an injury by the negligence of a boat or her owners or mariners. A court of admiralty has jurisdiction when the negligent act or omission, wherever done or suffered, takes effect and produces injuries to the person or property of another on navigable waters."

While counsel realizes that an opinion of a State court is not binding on the Supreme Court of the United States, yet when such an opinion is based upon sound reasoning and is in accord with numerous decisions of the Supreme Court of the United States, it should be highly persuasive. Such is the opinion in *De Gaetno vs. Merrett and Chapman Derrick and Wrecking Company*, 196 N. Y. Sup., 195. The facts are almost identical with the facts of the case under consideration, and we quote from the opinion as follows:

"The question here is whether or not the deceased was engaged in maritime employment. The State Industrial Board has held that he was not. The facts are undisputed. The deceased was a member of the crew of a scow, equipped as a floating derrick with a hoisting engine, and engaged generally in the wrecking business. It was also equipped with an air compressor for supplying air to divers operating from the vessel in subaqueous work. It was registered as a vessel with the United States custom house, and was towed at times to various places along the coast in the vicinity of New York City. At the time of the accident on August 29,

1921, it was made fast to a dock on the Harlem River and on concededly navigable waters.

"The duties of the deceased were those of deck hand and diver, principally the latter. On the day in question the vessel was being used to aid in laying an electric submarine cable from shore to shore of the river. The deceased was working as a diver. He dressed for diving on the vessel, and entered the water from the boat. His diving outfit was connected by an air tube to the air compressor, which was a part of the equipment of the boat. His particular work at the time was to stand on the bottom of the river, where he guided the cables through a hole in the bulkhead as they were pulled through the dock.

"While the diver was under water, the engineer of the scow operated the engine so as to furnish air to the air compressor tank, and a deck hand, standing aboard the boat, handled the tube running from the tank to the helmet of the diver, regulating the amount of air supply furnished to the latter, and signaling to the engineer to operate the engine when necessary. While the deceased was so working under the water, the air, in some unexplained manner, was cut off, causing his death.

"We think this case comes within the reasoning of this court in the case of *Norman v. Merriett & Chapman Derrick & Wrecking Co.*, 200 App. Div. 360, 193 N. Y. Supp. 195. The deceased was one of the crew of a vessel and at the time of his accident was engaged

in the very service for which the vessel was equipped and operated. He was a 'seaman,' actually attached to the vessel at the time through the instrumentality of the diver's uniform, the air tube, the compressor tank, and the engine of the boat, all of which were being simultaneously operated as equipment of the boat by himself, the deck hand, and the engineer as members of the crew. The nature of the scow's employment at the time is not material, since he was a seaman of a vessel, and he was constructively on the vessel, doing the work of the vessel under a maritime contract. The mere fact that his feet were touching the land under the water did not change the essential character of the operation, which consisted of the use of a vessel and its appliances and crew; the work of the deceased being an integral part of such operation. It was not an accident on land within the authority of State Industrial Commission *v.* Nordenholt Corporation *et al.* (recently decided by the United States Supreme Court), 259 U. S. 263.

"The award should be reversed, with costs against the State Industrial Board, and the claim dismissed. All concur except Hasbrouck, J., who dissents."

It is respectfully submitted that the above case is directly in point. The facts are practically identical. Both divers were working from a barge. Both divers were members of the crew engaged in maritime employment on the waters of a stream. Both were conceded to be navigable streams. The

barge from which Boudreux was working went from place to place on the river transporting the machinery, equipment, materials, and tools necessary for performing its duties in connection with the navigation of the stream, just as the barge did in the *De Gaetano* case. It was contended in the *De Gaetano* case that the cause was not of an admiralty nature because the workman was standing on the bottom of the river. In both cases he was attached to the barge from which his life line and air hose came, and that was his only means of communication with the outside world. In the *De Gaetano* case the diver was assisting in laying a cable; in the case under consideration Boudreux was engaged in removing an obstruction to navigation. Both were engaged in a maritime employment and in both cases the accident occurred in navigable waters. We respectfully submit that the cases are identical on the facts, and that the *De Gaetano* case was correctly decided.

The barge or boat upon which Boudreux was employed and to which he was attached at the time of his death was a vessel as the term "vessel" is used in admiralty: "The word 'vessel' includes every * * * water craft or other artificial contrivance used, or capable of being used, as a means of transportation on water." Revised Statutes U. S., Sec. 3 (Comp. St., Sec. 3); and "every person (apprentices excepted) who shall be employed or engaged to serve in any capacity on board the same shall be deemed and taken to be a

'seaman.' " Rev. St. U. S., Title 53, Section 4612, as amended by 30 Stat. 762, C. 28, Section 23, and 38 Stat., 1168, C. 153, Sec. 10 (Comp. St. sec. 8392).

In this case Boudreax's services had immediate connection with the vessel, itself. In *Ellis vs. United States*, 206 U. S., 246, it was held that all employees on scows were seamen, and, therefore, were not laborers and mechanics within the provisions of the Federal Eight Hour Law of 1892 (27 Stat., 340 C. 352; U. S. Comp. St., Sections 8912-8920), notwithstanding the fact that in the correlated cases reported with that case it was strongly urged by Justice Moody, dissenting, that the men who were engaged in the work of excavation on the scows or dredges had nothing whatever to do with navigation.

In re Eastern Dredging Co. (D. C.), 138 Fed., 942, involved a scow employed in carrying mud. In that case, construing section 4283 of the United States Revised Statutes and the provisions of the Act of 1886 (24 Stat., 80, Section 4, amending U. S. R. S., Section 4289 (U. S. Comp. St., Section 8027), the court said:

"There is no expression in the act, as it now stands, to indicate that the nature of the employment in which a vessel is engaged is to be considered in determining whether or not the act is to apply to her. That question is made to depend entirely upon the waters whereon she is used. The water whereon the petition alleges this scow to have been used are unquestionably waters within the ad-

miralty jurisdiction, and, having held her to be a vessel within the meaning of the act, I am unable to regard the nature of her employment as in any way material." 138 Fed. 945.

A case quite parallel to that before us is *The Sunbeam*, 195 Fed., 468; 115 C. C. A., 370. It appears that the *Sunbeam* was a scow, built for carrying stone. It carried a derrick. The vessel had been engaged in carrying stone about the harbor of New York, unloading the same at places where sea walls were being built and riprap work was being done. "She had not carried cargo for three years, but was capable of doing so, and at the time in question was anchored in the harbor of New York, about 300 feet from the shore at Bay Ridge." Apparently the scow was being employed in some harbor work for the city of New York, and an inspector of that city was injured by being struck by a stone which was being handled by the derrick of the *Sunbeam*. It was held that the owners of the scow could limit their liability under the statute of 1886, "which relates to all vessels by whatever name they may be known;" the court saying:

"It includes barges, canal boats, scows and lighters."

The barge or boat from which Boudreux was working was used to transport her crew and their materials, tools, appliances, and equipment from place to place on the water wherever they were engaged in submarine diving operations.

It follows that since this is a cause of action of an admiralty and maritime nature, the Texas courts had no jurisdiction under the Texas Workmen's Compensation Law or otherwise; that the Texas Workmen's Compensation Law is invalid under the Constitution of the United States in so far as an attempt is made to apply it to this admiralty or maritime cause of action, and that in rendering judgment against plaintiff in error under such law the Texas courts violated the Fourteenth Amendment as well as Article III, Section 2, of the Constitution of the United States.

Southern Pacific Company vs. Jensen, 244 U. S., 205;
Peters vs. Veazy, 251 U. S., 121;
Atlantic Transport Co. vs. Imbrokek, 234 U. S., 52;
Kincherbocker Ice Co. vs. Stewart, 253 U. S., 149.

Conclusion.

Plaintiff in error respectfully submits that upon the undisputed evidence this case is based upon an alleged maritime tort which is cognizable exclusively in a court of admiralty under Article III, Section 2, of the Constitution of the United States; that the Texas courts had no jurisdiction of this cause of action under the Texas Workmen's Compensation Law or otherwise; that the Texas Workmen's Compensation Law is invalid under the Con-

stitution of the United States in so far as an attempt is made to apply it to this admiralty or maritime cause of action, and that in rendering judgment against plaintiff in error under such law the Texas courts violated the Fourteenth Amendment as well as Article III, Section 2, of the Constitution of the United States.

Wherefore plaintiff in error prays that the judgment of the Supreme Court of Texas be reversed, with an instruction to reverse the judgments of the Court of Civil Appeals and of the District Court of Orange County, Texas, and to instruct the latter court to dismiss the cause for want of jurisdiction.

Respectfully submitted,

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WM. R. STANSBURY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1925

No. 124

MILLERS INDEMNITY UNDERWRITERS
PLAINTIFFS IN ERROR

vs.

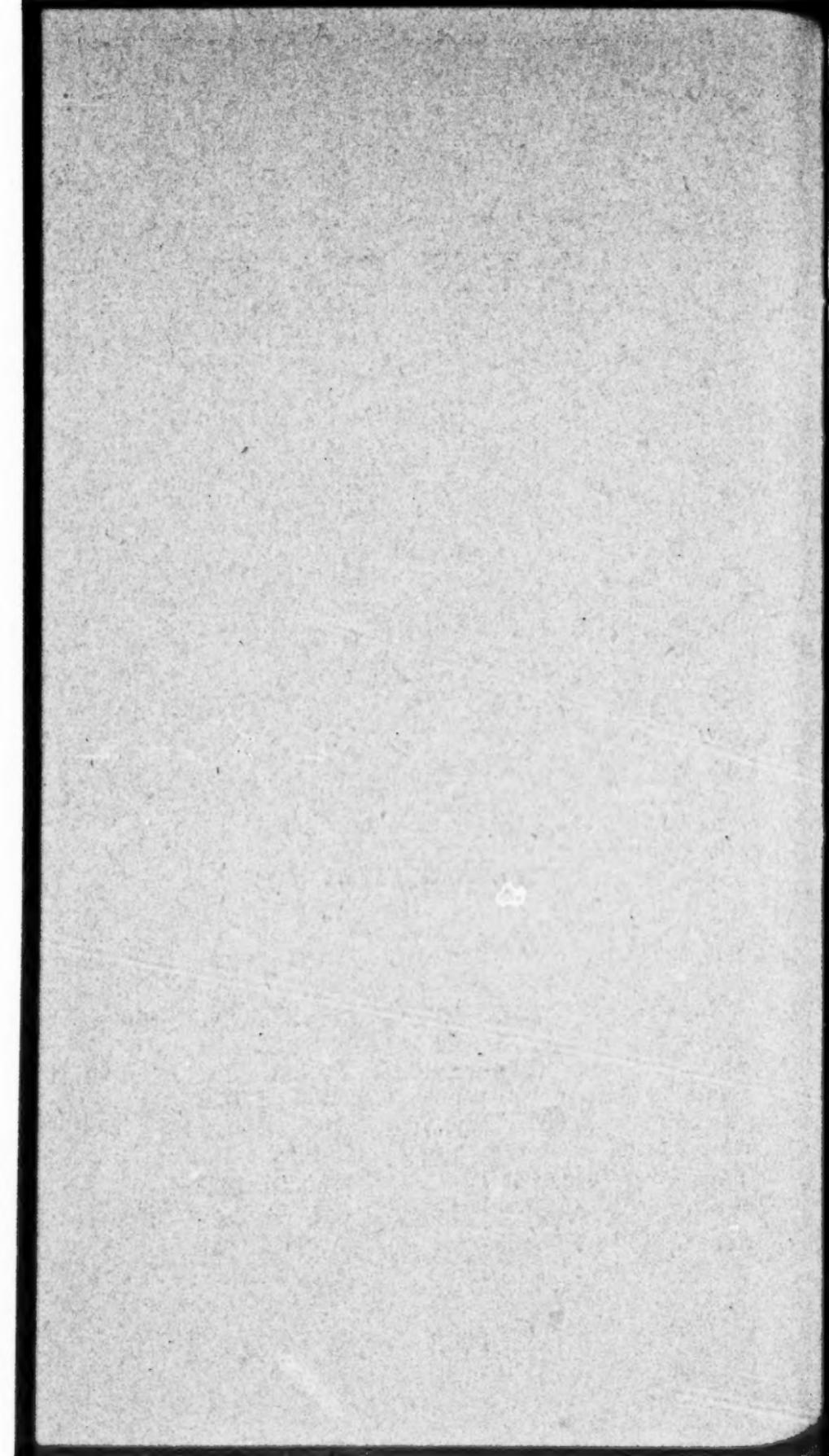
MRS. NELLIE BOUDREAUX BRAUD
(MRS. E. J. BRAUD)

DEFENDANT IN ERROR

BRIEF FOR DEFENDANT IN ERROR

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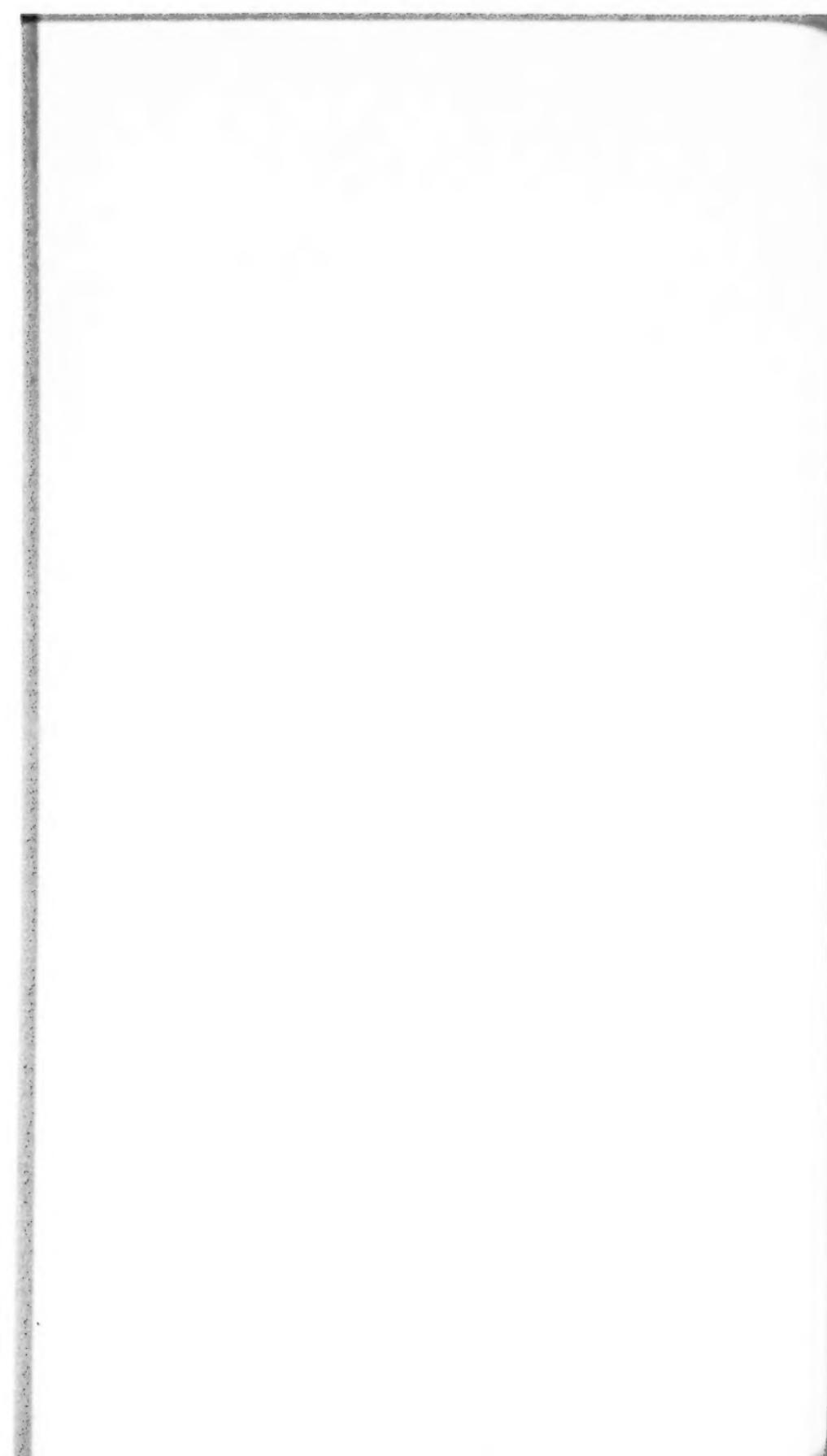


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SUPREME COURT OF THE UNITED STATES

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No. 124

MILLERS INDEMNITY UNDERWRITERS
PLAINTIFFS IN ERROR

vs.

MRS. NELLIE BOUDREAUX BRAUD
(MRS. E. J. BRAUD)

DEFENDANT IN ERROR

BRIEF FOR DEFENDANT IN ERROR

OBJECTION TO CONSIDERATION OF BRIEF FOR PLAINTIFF IN ERROR.

Defendant in error objects to the consideration of said brief because it is not in substantial compliance with Sub-section 2 of Section 2 of Rule 21 of this Court, same being of the tenor following:

“The brief shall contain a specification of errors relied on, which, in cases brought up by writ of error, shall set out separately and particularly each error asserted and intended to be urged.”

As shown under the heading of "Specifications of Error" on page 8 of said brief, the specifications of errors are not therein set out, but the Court is merely directed where to find them in the record.

REPLY TO ARGUMENT OF PLAINTIFF IN ERROR.

This argument is based upon a syllogism, both the major and minor premises of which are palpably erroneous. It begins with the proposition that the Constitution gives the Federal Courts exclusive jurisdiction of all Admiralty and maritime cases; and the next step in the erroneous reasoning is the unsupported assertion that this particular case is maritime, within the legal signification of that term. Neither of these propositions is legally accurate.

In the first place, the said Constitutional provision must be considered in its historical setting. The Common Law Courts always had jurisdiction of the cause of action against the shipowner in contract or in tort when he could be reached personally and when money damages were demanded. That right was not taken away by the grant in the Constitution; but the right also to hear such cases, as well as other cases of admiralty jurisdiction, was given to the newly constituted Federal judiciary. The jurisdiction of the Admiralty and Common Law Courts is, therefore, to a certain extent, concurrent. The Common Law jurisdiction, when concurrent with Admiralty jurisdiction, may be exercised by State Courts or, within the limitations of the Constitution and the Acts of Congress, by the United States District Courts on the Common Law side. (Benedict on Admiralty, Vol. 1, 5th Ed. Sec. 20; 3 Story Com.

Const. Sec. 1666; Taylor vs. Carrul 61 U. S. (20 How) 583, 15 L. Ed. 1028). We quote from Story, *supra*:

“The reasonable interpretation would seem to be that it conferred on the national judiciary the Admiralty and maritime jurisdiction, according to the nature, extent and modification in which it exists in the jurisprudence of the Common Law. When the jurisdiction was exclusive it remains so; when it was concurrent, it remains so. Hence, the States could have no right to create Courts of Admiralty as such, or to confer on their own Courts the cognizance of such cases as were exclusively cognizable in Admiralty Courts; but the States might well retain and exercise the jurisdiction in cases of which the cognizance was formerly concurrent in the Courts of Common Law. The latter class of cases can be no more deemed cases of admiralty and maritime jurisdiction than cases of common law.”

The judiciary act which, in 1789, established the United States Courts and defined their jurisdiction, is a contemporaneous construction of the Constitution and confirmed the existing right of the Common Law Courts by providing that the United States District Courts should have “exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction” etc. “saying to suitors in all cases, the right of a common law remedy where the common law is competent to give it.” The common law remedy thus saved to suitors, is the right to proceed in personam against the defendant, which remedy the common law is competent to give. Therefore, a direct suit against a shipowner, for instance, to recover seaman’s wages, or damages for collision, or for breach of charter, or for other personal demand, where jurisdiction of the person of the defen-

dant can be secured, may be brought either in admiralty or at common law; the two Courts having, in this respect, concurrent jurisdiction. (*Leon vs. Galeeran* 78 U. S. 185; *Shoonumaker vs. Gilmore*, 102 U. S. 118; *Belden vs. Case* 150 U. S. 674). Moreover, the common law Court may entertain a suit on a formal contract for the agreed price, or on an implied contract for the reasonable value of the work, labor and services in the recovery of a vessel, but it does not take into account the elements of peril, hardship and bravery which are considered and rewarded by the Admiralty Courts in salvage cases. (*Merritt etc. Company vs. Tice*, 79 N. Y. Supp. 120, 103 N. Y. Supp. 333). Further, a State law may authorize appropriate proceedings in the State Courts to compel specific performance of an arbitration clause in a maritime contract, for such legislation does not purport to modify the substantive maritime law or the remedy in Courts of Admiralty. (*Red Cross Line vs. Atlantic Fruit Co.*, 264 U. S. 109).

The foregoing are merely a few of almost innumerable instances where the State Courts can properly take cognizance of what may be properly termed true admiralty and maritime matters. It follows, therefore, that there is a particular zone given to both the admiralty and common law Courts, wherein each can legally take jurisdiction. Therefore, not all admiralty and maritime matters are exclusively cognizable in the Federal Courts, as alleged in the major premise of plaintiff in error's reasoning.

Not only so, but the matter or cause of action in the instant case does not properly come within the class of causes legally maritime or admiralty. The Courts have, in many instances, said whether certain particular con-

troversies were maritime or not, but no satisfactory definition has yet been formulated, or, at least, enunciated, which will be a safe guide or criterion to determine whether a given case is maritime or not. In De Lovio vs. Boit, 2 Gal. 398, Fed. Cas. No. 3776, Mr. Justice Story says that maritime matters included "all transactions and proceedings relative to commerce and navigation, and all contracts that relate to the navigation, business or commerce of the sea." If the subject matter of the contract concerned the navigation of the sea, it is a case of admiralty and maritime jurisdiction. (Zane vs. The President, 11 Wall. 1, 20 L. Ed. 90).

TEST OF WHETHER A CERTAIN MATTER IS MARITIME FOR PURPOSE OF DETERM- INING JURISDICTION.

Such test of jurisdiction is different as to tort or contract matters. The test in contract cases is the nature of the transaction. The test in tort cases is the locality. It is now definitely settled that the test in matters of contract is irrespective of locality and depends upon the nature of the transaction. (Grant-Porter Ship Co. vs. Rhode, 257 U. S. 439; State Ind. Com. vs. Nordenholt Corp. 259 U. S. 263; Western Fuel Co. vs. Gareia 257 U. S. 233).

Under the provisions of the Texas Compensation Law, which determined the rights of the parties to this cause, the element of tort or locality is wholly eliminated and constitutes no part of the cause of action, which rests entirely in contract among employee and employer and the insurer; the contract of insurance under the statute being for the benefit of the employee sustaining accidental injury in the course of his employment. The

employer and the insurer enter into a contract for the protection of the employer and the employees, having reference to the provisions of the statute which are read into and become a part of the contract of insurance. (Grant-Porter Ship Co. vs. Rhode 257 U. S. 469). This remedy, given by the Texas Compensation Statute, to the injured employee, where he and his employer voluntarily enter into such contractual arrangements, is exclusive of all other remedies and the tort element, together with full indemnity for negligence, is completely eliminated and expressly excluded.

Therefore, the test to be applied in this case to determine jurisdiction, is the said contract and its nature; and not to any extent the alleged tort and its locality. It follows, therefore, that the mere fact that Boudreax, when he sustained his injuries resulting in death, was working as a diver on the bottom of the Sabine River in navigable water does not determine exclusive jurisdiction in admiralty, for the simple reason that this cause of action does not in any manner sound in tort but is based wholly on the contract. Therefore, to determine the true jurisdiction of this cause, it is necessary to look to the contract and the nature of the work being done. (See the Rhode and Nordenholz cases supra.)

THE NATURE OF THE CONTRACT AND THE WORK BEING DONE UNDER IT.

What was the nature and character of the work being done? This has been described with sufficient accuracy by opposing counsel in their brief. The ultimate material facts are that Boudreax, in the employ of the National Ship Building Co., in the course of his em-

ployment undertook to remove some piling, part of the ways formerly used by the Company in launching boats built by them. He was sent down into the waters of the Sabine River in the full equipment of a diver from a small boat, which was without means of self-propulsion, having on it a small dressing room, pumps and other equipment. Boudreux was working under the water about 35 feet from the bank of the stream, sawing off the piling, for which the Company no longer had any use, as the work of building and launching boats had terminated, and which were connected with the wharf or bank of the stream, and now being removed—to put it in its most favorable light for plaintiff in error—as a possible obstruction to future navigation and commerce. This work had no direct relation to, or connection with, either navigation or commerce.

In the Rhode case, which was based on the Oregon Compensation law, in all respects similar to that of Texas, this Court said:

“Neither Rhode’s general employment nor his activities at the time had any direct relation to navigation or commerce.”

And this was so held though Rhode at the time, was a carpenter engaged in finishing the almost completed vessel which had been already launched in navigable waters. Certainly his work which was being done in completion of a launched vessel about to be placed in actual commercial navigation, had decidedly more direct and immediate relation to navigation and commerce than did that of Boudreux in removing piling to prevent possible obstruction to some future navigation and commerce. Still quoting from this Court’s decision in the Rhode case:

"In certain local matters, regulation of which would work no material prejudice to general maritime law, the rules of the latter might be modified or supplemented by state statutes."

The present case is controlled by that principle.

As pointed out by the Supreme Court of Texas in its decision in this case (261 S. W. 138) :

"The work being done by Boudreax was on the ways constructed for launching ships. The ways are constructed by driving piling from the bank out into the river and are simply appurtenant to or a necessary part of the docks or wharf. They are merely a continuation or extension of the land structures which are used in connection with the construction of vessels and their launching. The case of Cleveland Ter. & Valley R. R. Co. vs. Cleveland S. S. Co., 208 U. S. 316, bears on this question. That was a suit for damages to dock, pier, piling, etc., and in discussing the matter of jurisdiction the Court said: 'The shore docks, protection piling, piers, etc., appertain to the land. They were structures connected with the shore and immediately concern commerce on land. None of these structures were aids to navigation in the maritime sense, but extensions of the shore and aids to commerce on land as such. (Sou. Lighterage Co. vs. U. S. 284 Fed. 978, Aff. 260 U. S. 699, holding that a group of piles in the Mississippi River at the foot of a street in New Orleans, used for mooring of vessels or keeping them in deep water while unloading, were a land structure and not an aid to navigation, and a suit for injury to them was not within admiralty jurisdiction.)'"

But while the proper jurisdiction of this case is actually determined on the principle of contract and on the nature of the work being done, yet, if the Texas Com-

pensation Law were eliminated and the cause of action regarded as being founded on tort, this, under the decisions and principles of law above set forth, would not bring this cause within the exclusive admiralty jurisdiction but would merely have the effect of bringing it within that large class of causes of concurrent jurisdiction of the Admiralty and Common Law Courts. This brings us, in the last analysis of the principles applicable to the facts of this case, to the truly distinguishing features that control its jurisdiction, to-wit:

1. Whether or not the said contract and the work being done had direct and immediate relation to navigation and commerce; and
2. Whether or not jurisdiction and cognizance of said cause in a State or Common Law Court, would work material prejudice to the characteristic features of the general maritime law or interfere with the proper harmony and uniformity of that law in its international and interstate relations.

These ruling principles were definitely formulated and applied by this Court in the Rhode, Jensen and in various other cases growing out of the compensation laws of the several States; and the facts in the instant case are so pointedly analogous to those in the Rhode case, *supra*, as to be substantially and legally identical. In that case, this Court answered two questions certified by the United States Circuit Court of Appeals for the Ninth Circuit, and the answer to the second question was:

“Assuming that the second question presents the inquiry whether, in the circumstances stated, the exclusive features of the Oregon Workmen’s Compensation Act would apply and abrogate the

right to recover damages in an admiralty Court, which otherwise would exist, we also answer, Yes."

Moreover, in that case, this Honorable Court held that the facts therein at issue, to-wit, a suit to recover compensation under the Workmen's Compensation Law of Oregon, originally brought in the United States District Court, involved a local matter the regulation of which by the State would work no material prejudice to the general maritime law or interfere with the proper harmony and uniformity of that law in its international and interstate relations. If this was true in that case, *a fortiori* would it be true with respect to the facts of this case. Cognizance by the State Court cannot possibly touch or work material prejudice to the general maritime law; it cannot interfere with the proper harmony and uniformity of that law in its international and interstate relations; and, therefore, it cannot impinge upon the admiralty jurisdiction of the Federal Courts; and the full purpose of the constitutional grant to the Federal Courts and the limitation upon the State Courts as to admiralty and maritime causes would not be in anywise impaired. (*Western Fuel Co. vs. Garcia* 259 U. S. 233).

The foregoing principles and distinguishing features were clearly developed by this Court in *S. P. Co. vs. Jensen*, 244 U. S. 205. There a longshoreman was doing the work of unloading a vessel in navigable waters—a work directly connected with navigation and commerce; and substantially the same facts and principles were involved in *Peters vs. Veasey*, 251 U. S. 121.

The plaintiff in error cites the case of *Home Life and Accident Ins. Co. vs. Wade*, 236 S. W. 778, as holding that an employee injured while on a derrick barge

in the Sabine River assisting in loading cranes is not entitled to compensation under the Compensation Act of Texas. In this case the Supreme Court of Texas granted a writ of error, but never decided the case for the reason that, before it was reached, it was settled and dismissed. This case was decided by the Court of Civil Appeals for the Ninth Supreme Judicial District at Beaumont, the same Court which originally passed upon the instant case (245 S. W. 1025) in which the Court, in remarking upon its decision in the Wade case, said:

"In Home Life and Accident Co. vs. Wade, 236 S. W. 778, we recently applied the rule announced by the Supreme Court of the United States in the Jensen case, as we then understood it, and held that the cause of action as therein asserted was maritime in its nature and exclusively cognizable in a Court of admiralty. A writ of error was granted against our holding, after being dismissed by the Supreme Court for want of jurisdiction. Hence it would appear that our holding in that case was most carefully reviewed by our Supreme Court and after such a review the writ was granted. Since our decision in that case the Supreme Court of the United States has further discussed the relation of State Workmen Compensation Acts to the maritime law of the United States in Western Fuel Oil vs. Garcia 257 U. S. 233; Grant-Porter Ship Co. vs. Rhode, 257 U. S. 469; and Ind. Com. vs. Nordenholz 259 U. S. 263. We did not have these cases before us at the time we filed our opinion in the Wade case. As we now understand the question involved in appellant's proposition we do not think the Wade case was correctly decided, especially so in view of the fact that a writ was granted against our holding. Recently, in an opinion by the Chief Justice of this Court, in Lumber-

men Reciprocal Ass'n vs. Adecock, 244 S. W. 645, we held that the Workmen's Compensation Act of this State covered injuries received while one, engaged in work on navigable waters, working from a small boat, was injured in his efforts to take sunken logs out of the water."

There may be serious question whether the Wade case was not properly decided in the first instance, for that, as it appears from the facts of that case, he was loading a barge on navigable waters which was destined for interstate commerce between Louisiana and Texas; and, it may be that the said work was thus directly connected with navigation and commerce, the same as the work of a longshoreman in loading and unloading a ship on navigable waters for such commerce.

We think that the Supreme Court of Texas has properly distinguished and disposed of those leading cases cited by plaintiff in error, involving rights of seamen as follows:

"We have carefully considered the cases relied upon by the plaintiff in error, as well as many others. The cases of De Gaetano vs. Merritt Chapman Co., 203 App. Div. 259, 196 N. Y. Sup. 573, and Norman vs. Merritt Chapman Co., 200 App. Div. 360, 193 N. Y. Sup. 195, are easily distinguished from this case and those we have cited. In this case the persons who lost their lives were all held to be 'seamen' engaged in services upon a vessel as each of these terms have been defined by Federal statutes and decisions. We do not see how it can be seriously contended that in this instance Boudreaux could be considered a "seamen" or engaged in work upon or connected with a vessel."

So plainly and palpably is the instant case ruled by the principles applied by this Honorable Court in the Rhode case, supra, that we have filed a motion herein to tax the plaintiff in error 10 per cent additional for delay under Section 2 of Rule 23 of this Court, on the ground that it is manifest that the writ of error was taken for delay only.

WHEREFORE, defendant in error prays that the judgment herein of the Supreme Court of Texas be affirmed and that the plaintiff in error be taxed with an additional 10 per cent because the writ of error was taken for delay only and without meitorious ground; for all costs of this appeal; and for all such further relief to which defendant in error may be entitled in law or in equity.

Respectfully submitted,

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FILED

JAN 4 1926

WM. R. STANSBURY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1925.

No. 124.

MILLERS INDEMNITY UNDERWRITERS, PLAINTIFFS
IN ERROR,

vs.

NELLIE BOUDREAUX BRAUD (Mrs. E. J. BRAUD),
DEFENDANT IN ERROR.

MOTION TO TAX 10% ADDITIONAL FOR DELAY.

To the Honorable the Supreme Court of the United States:

The motion of Mrs. E. J. Braud, defendant in error, respectfully shows to the Court as follows:

This suit was instituted in the District Court of Orange County, Texas, by defendant in error to set aside the award of the Industrial Accident Board of Texas denying compensation for the death of O. O. Boudreux under the Texas Compensation Law. Judgment was entered by the District Court in favor of Mrs. E. J. Braud, which said judgment was affirmed by the Court of Civil Appeals for the Ninth Supreme Judicial District of Texas at Beaumont (245 S. W.,

1025). The Supreme Court of Texas granted writ of error therein and on full argument affirmed the judgment of said Court of Civil Appeals (261 S. W., 127).

The ultimate undisputed facts here material are: Said Boudreux in the course of his employment as diver with the National Ship Building Company, sustained injuries while doing work in and under the navigable waters of Sabine River, cutting out timbers and dismantling the ways that had been formerly used in launching ships. He was doing the work from a barge or pontoon connected with and attached to the wharf. He was working under the water about thirty-five feet from the bank of the stream in a diving suit, the apparatus of which was connected with the barge, the wharf, and the land, and while thus doing the work of cutting out certain parts of the ways to prevent obstructing the river he died, as the evidence shows, from suffocation resulting from some defects in the appliances.

The work that Boudreux was doing had no direct connection with, nor relation to, either navigation or commerce, but was being done merely for the purpose of clearing navigable waters of possible obstructions to future navigation.

Plaintiff in error contended that the action was one exclusively cognizable in a court of admiralty and that, therefore, the District Court of Orange County, Texas, had no jurisdiction, this contention being based on the proposition that, as applied to the facts of this particular case, the Compensation Law of the State of Texas was and is repugnant to that certain provision of the Constitution of the United States extending and granting Federal judicial power "to all cases of the admiralty and maritime jurisdiction" (being part of Section 2, Article 3, of the Federal Constitution).

The exact proposition urged by plaintiff in error in the State courts and here now being contended for in this Honorable Court was passed upon and adversely decided by this Court in the case of *Grant Smith-Porter Ship Company vs. Rhode*, 257 U. S., 469; 42 Sup. Ct., 157; 66 L. Ed., 321; 25 A. L. R., 1008, and in *State Ind. Com. vs. Nordenholt Corp.*, 259 U. S., 263; 42 Sup. Ct., 473; 66 L. Ed., 933; 25 A. L. R., 1013, both of which involved such pointedly analogous facts as to be in substance legally identical.

This is a clear case where a writ of error has delayed the proceedings on the judgment rendered in this cause in the Supreme Court of Texas, and it is palpably apparent that the said writ of error sued out in this Honorable Court was merely for delay; and, therefore, under and by virtue of Section 2 of Rule 23 of this Court, defendant in error is entitled to an award of damages at a rate not exceeding 10 per cent in addition to the legal interest.

Wherefore, under Section 5 of Rule 6 of this Court, defendant in error moves that the final judgment rendered in this cause by the Supreme Court of Texas be affirmed on the ground that it is manifest that the writ of error was taken for delay only, and that the question on which the decision herein depends is so frivolous as not to need further argument.

Respectfully submitted.

C. W. HOWTH,
DAVID E. O'FIEL,
M. G. ADAMS,
Attorneys for Defendant in Error.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1925.

No. 124.MILLERS INDEMNITY UNDERWRITERS, *Plaintiffs in Error,**vs.*NELLIE BOUDREAUX BRAUD (Mrs. E. J. Braud),
Defendant in Error.

THE STATE OF TEXAS,

County of Jefferson:

Before me, the undersigned authority, on this day personally appeared M. G. Adams, who, being by me duly sworn, on his oath deposes and says that he is one of the attorneys for the defendant in error in that certain cause pending in the Supreme Court of the United States, No. 124, Millers Indemnity Underwriters, plaintiffs in error, *vs.* Nellie Boudreaux Braud (Mrs. E. J. Braud), defendant in error, and that on the 30th day of December, 1925, he delivered to J. B. Morris and J. Austin Barnes, attorneys for plaintiff in error, a true copy of the motion of the defendant in error filed herein to tax, under the rules of the Supreme Court of the United States, the plaintiff in error with an additional sum of 10 per cent for delay.

M. G. ADAMS.

Sworn to and subscribed before me this 1st day of January, 1926.

[SEAL.]

LUCILE HOLLAND,
Notary Public, Jefferson County, Texas.

(22)

SUPREME COURT OF THE UNITED STATES.

No. 124.—OCTOBER TERM, 1925.

Millers' Indemnity Underwriters, Plaintiff in Error,
vs.
Mrs. Nellie Boudreaux Braud (Mrs. E. J.
Braud) and Ed. J. Braud. } In Error to the Supreme
Court of the State of Texas.

[February 1, 1926.]

Mr. Justice McREYNOLDS delivered the opinion of the Court.

The court below affirmed a judgment of the Orange County District Court in favor of defendant in error for compensation under the Workmen's Compensation Law of Texas (Gen. Laws 1917, p. 269) on account of the death of her brother, O. O. Boudreaux. April 17, 1920, while employed as a diver by the National Ship Building Company, he submerged himself from a floating barge anchored in the navigable Sabine River thirty-five feet from the bank, for the purpose of sawing off the timbers of an abandoned set of ways, once used for launching ships, which had become an obstruction to navigation. While thus submerged the air supply failed and he died of suffocation.

The employing company carried a policy of insurance with plaintiff in error conditioned to pay the compensation prescribed by the statute and accordingly was "regarded as a subscriber" to the Texas Employers' Insurance Association therein provided for. Part I, Sec. 3 of the statutes declares—

The employees of a subscriber shall have no right of action against their employer for damages for personal injuries, and the representatives and beneficiaries of deceased employes shall have no right of action against such subscribing employer for damages for injuries resulting in death, but such employes and their representatives and beneficiaries shall look for compensation solely to the association, as the same is hereinafter provided for . . .

It also prescribes a schedule of weekly payments for injured employes or their beneficiaries, and provides for a Board to pass

upon claims and an ultimate right to proceed in court. Subscribers' employes do not contribute to the necessary costs of such protection. They are presumed to accept the plan and to waive all right to recover damages for injuries at common law or under any statute unless they give definite written notice to the contrary. No such notice was given by the deceased.

Plaintiff in error insists that the claim arose out of a maritime tort; that the rights and obligations of the parties were fixed by the maritime law; and that the State had no power to change these by statute or otherwise.

This subject was much considered in *Grant Smith-Porter Co. v. Rohde*, 257 U. S. 469, 477—here on certificate—which arose out of injuries suffered by a carpenter while at work upon an uncompleted vessel lying in navigable waters within the State of Oregon. The words of the local statute applied to the employment and prescribed an exclusive remedy. We said the cause was controlled by the principle that, as to certain local matters regulation of which would work no material prejudice to the general maritime law, the rules of the latter may be modified or supplemented by State statutes. And we held that under the circumstances disclosed “regulation of the rights, obligations and consequent liabilities of the parties, as between themselves, by a local rule would not necessarily work material prejudice to any characteristic feature of the general maritime law, or interfere with the proper harmony or uniformity of that law in its international or interstate relations.” Stressing the point that the parties were clearly and consciously within the terms of the statute and did not in fact suppose they were contracting with reference to the general system of maritime law, we alluded to the circumstance, not otherwise of special importance, that each of them had contributed to the industrial accident fund.

And answering the certified questions we affirmed that “the general admiralty jurisdiction extends to a proceeding to recover damages resulting from a tort committed on a vessel in process of construction when lying on navigable waters within a State.” Also, that “in the circumstances stated the exclusive features of the Oregon Workmen’s Compensation Act would apply and abrogate the right to recover damages in an admiralty court which otherwise would exist.”

In the cause now under consideration the record discloses facts sufficient to show a maritime tort to which the general admiralty

jurisdiction would extend save for the provisions of the State Compensation Act; but the matter is of mere local concern and its regulation by the State will work no material prejudice to any characteristic feature of the general maritime law. The Act prescribes the only remedy; its exclusive features abrogate the right to resort to the admiralty court which otherwise would exist.

We had occasion to consider matters which were not of mere local concern because of their special relation to commerce and navigation, and held them beyond the regulatory power of the State, in *Great Lakes Dredge & Dock Co. v. Kierejewski*, 261 U. S. 479; *Washington v. Dawson & Co.*, 264 U. S. 219; *Gonsalves v. Morse Dry Dock Co.*, 266 U. S. 171; and *Robins Dry Dock Co. v. Dahl*, 266 U. S. 449, 457.

The conclusion reached by the court below is correct and its judgment must be

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.